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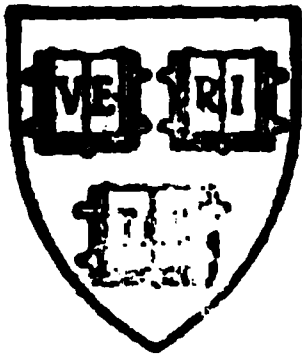
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REPORTS OF CASES

IN THE

SUPREME COURT

OF

NEBRASKA.

JANUARY TERM, 1895.

VOLUME XLIV.

D. A. CAMPBELL,

OFFICIAL REPORTER.

LINCOLN, NEB.:

STATE JOURNAL COMPANY, LAW PUBLISHERS.

1895.

Entered according to act of Congress in the office of the Librarian of Congress,
A. D. 1895,

BY D. A. CAMPBELL, REPORTER OF THE SUPREME COURT,
In behalf of the people of Nebraska.

Rec. Dec. 24, 1895.

THE SUPREME COURT

• OF
NEBRASKA.

1895.

CHIEF JUSTICE,
T. L. NORVAL.

JUDGES,
A. M. POST,
T. O. C. HARRISON.

COMMISSIONERS,
ROBERT RYAN,
JOHN M. RAGAN,
—FRANK IRVINE.

OFFICERS.

ATTORNEY GENERAL,
A. S. CHURCHILL.

CLERK AND REPORTER,
D. A. CAMPBELL.

DEPUTY CLERK,
W. B. ROSE.

DISTRICT COURTS OF NEBRASKA.

JUDGES.

First District—

A. H. BABCOCK.....Beatrice.
J. E. BUSH.....Beatrice.

Second District—

S. M. CHAPMAN.....Plattsmouth.

Third District—

CHARLES L. HALLLincoln.
E. P. HOLMES.....Lincoln.
A. S. TIBBETSLincoln.

Fourth District—

G. W. AMBROSEOmaha.
J. H. BLAIROmaha.
E. R. DUFFIE.....Omaha.
A. N. FERGUSONOmaha.
M. R. HOPEWELL.....Tekamah.
W. W. KEYSOR.....Omaha.
C. R. SCOTTOmaha.

Fifth District—

EDWARD BATES.....York.
ROBERT WHEELEROsceola.

Sixth District—

WM. MARSHALLFremont.
J. J. SULLIVANColumbus.

Seventh District—

W. G. HASTINGS.....Wilber.

Eighth District—

W. F. NORRIS..... Ponca.

Ninth District—

J. S. ROBINSON.....Madison.

Tenth District—

F. B. BEALIAlma.

Eleventh District—

A. A. KENDALLSt. Paul.
J. R. THOMPSON.....Grand Island.

DISTRICT COURTS OF NEBRASKA. v

Twelfth District—

H. M. SINCLAIRKearney.

Thirteenth District—

WILLIAM NEVILLE.....North Platte.

Fourteenth District—

D. T. WELTY.....Cambridge.

Fifteenth District—

ALFRED BARTOW.....Chadron.

M. P. KINKAID.....O'Neill.

PRACTICING ATTORNEYS.

ADMITTED SINCE THE PUBLICATION OF VOLUME XLIII.

ARTHUR, J. G.

BABCOCK, G. T. H.

BEELEB, J. G.

DUNN, I. J.

GILBERT, WILLIAM O.

HABEGGER, J. ARNOLD.

HELLER, FRANK.

SUPREME COURT COMMISSIONERS.

(Laws 1893, chapter 16, page 150.)

SECTION 1. The supreme court of the state, immediately upon the taking effect of this act, shall appoint three persons, no two of whom shall be adherents to the same political party, and who shall have attained the age of thirty years and are citizens of the United States and of this state, and regularly admitted as attorneys at law in this state, and in good standing of the bar thereof, as commissioners of the supreme court.

SEC. 2. It shall be the duty of said commissioners, under such rules and regulations as the supreme court may adopt, to aid and assist the court in the performance of its duties in the disposition of the numerous cases now pending in said court, or that shall be brought into said court during the term of office of such commissioners.

SEC. 3. The said commissioners shall hold office for the period of three years from and after their appointment, during which time they shall not engage in the practice of the law. They shall each receive a salary equal to the salary of a judge of the supreme court, payable at the same time and in the same manner as salaries of the judges of the supreme court are paid. Before entering upon the discharge of their duties they shall each take the oath provided for in section one (1) of article fourteen (14) of the constitution of this state. All vacancies in this commission shall be filled in like manner as the original appointment.

SEC. 4. Whereas an emergency exists, this act shall take effect and be in force from and after its passage and approval.

Approved March 9, A. D. 1893.

RULES OF SUPREME COURT.

IN FORCE SEPTEMBER 17, 1895.

1. The regular public sessions of this court will be held on the first and third Tuesdays of each month at 9 o'clock A. M., standard time, during each term.

2. Causes will be taken up and heard in their order on the docket. Any cause may, however, be submitted upon a written stipulation of the parties thereto providing for such submission on printed briefs accompanied by or containing an agreed printed abstract of all the evidence upon which the case is to be determined. Whenever a cause is reached and the party having the affirmative fails to appear, and his brief is not on file, the proceeding will be dismissed, the cause remanded, or otherwise disposed of at the discretion of the court. When default has been made by the other party and there is due proof of service of summons in error, or of notice, and the briefs of the party holding the affirmative are on file, with proof of service thereof within the time provided by rule 9, he may proceed *ex parte*.

3. The court, in advance, shall, by order, designate what cases shall be submitted and when, having reference to the order of time in which such cases were originally docketed.

4. Whenever, in a criminal case, a writ of error shall be issued upon a certified transcript of a record, no further transcript shall be required or allowed to be taxed in the bill of costs, but the same transcript shall be returned with the writ, and shall be deemed sufficient, unless diminution or other objection thereto be suggested.

5. In the oral argument of a cause, the time allowed the parties on each side shall not exceed thirty minutes, unless

for special reasons the court shall extend the time. Oral argument on a motion will be limited to five minutes on a side.

6. Every application for an order in any case shall be in writing, and except as to motions for rehearing, shall be granted only upon the filing thereof, and due proof of service of notice on the adverse party, or his attorneys, at least three days before the hearing, which, in all cases, must be fixed for one of the session days provided for by rule 1. The notice herein provided for shall conform to the provisions of section 574 of the Code of Civil Procedure, and may be served by a bailiff of this court, or by any sheriff or constable in this state, or by any disinterested person; in the latter case, however, the return must be under oath. Fees for service of said notice shall be allowed and taxed as for the service of summons in proper cases.

7. A motion for rehearing may be filed as of course at any time within forty days from the filing of the opinion of the court in the case. Such motion must specify distinctly the grounds upon which it is based, and be accompanied by a separate printed brief.

8. No mandate shall issue in any civil case during the time allowed for the filing of a motion for rehearing, or pending the consideration thereof, unless specially ordered by the court.

9. Within twenty days after service of summons in error, or of notice of the pendency of an action by appeal or otherwise in this court, and within the same time after a rehearing shall have been allowed, the party holding the affirmative shall furnish a printed brief of his points and citations in support thereof, to the opposite party or his attorney of record, by whom in turn a like brief in reply shall be served within twenty days after service of the first required brief, or, if none such shall have been served, then within twenty days after the expiration of the time allowed for that purpose. Before the submission of any cause, each party shall file with the clerk of this court ten

printed copies of the brief which he has furnished the opposite party or his attorney of record, with proof of service thereof. Each brief shall by number designate the several pages of the record containing matter bearing upon the questions discussed in such brief. Every reference to an adjudicated case shall be by the title thereof, as well as by the volume and page where it may be found, and the particular edition of any text-book referred to must be given in connection with the cited page or section thereof.

10. All briefs shall be printed on good book paper, small pica type, leaded lines; the printed page to be four inches wide and seven inches long, with a margin of two inches; but the type in which extracts are printed may be small pica solid, or brevier leaded. The heading of each brief shall show the title of the cause, the court from which the cause is brought, and the names of counsel for both parties.

11. When the parties or their attorneys shall furnish their printed briefs in conformity to the rules of this court, or briefs and printed abstract under stipulation for submission as provided for in rule 2, it shall be the duty of the clerk to tax a printer's fee at the rate of one dollar for every five hundred words embraced in a single copy of the same, against the unsuccessful party not furnishing the same, to be collected and paid to the successful party as other costs. When unnecessary costs have been made by either party, the court will, upon application, order the same taxed to the party making them, without reference to the disposition of the case.

12. In each cause brought to this court the plaintiff in error, appellant, or relator shall, before the entry of the same upon the docket, give security for costs by filing a bond in the sum of \$50, with one or more sureties, conditioned for the payment of the costs of this court, which bond, in cases brought on error or appeal, must be approved by the clerk of the district court of the county from which such cause is brought, and in original causes by the clerk

of this court. But this provision shall not apply in causes where a bond or undertaking has been filed in the court below, in accordance with the provisions of sections 588 and 677 of the Code of Civil Procedure, but in such causes the transcript filed must show the giving of such bond or undertaking, with the names of the sureties thereon; nor shall it apply in criminal cases where an affidavit of poverty is filed, as allowed by section 508, Criminal Code. The party bringing the cause to this court may, if he sees fit, deposit an amount with the clerk of this court sufficient to cover the probable costs of the action, and if he do so the bond required by this rule need not be given.

13. In every case of appeal the clerk shall, upon a *præcipe* being filed, issue a notice to the appellee of the filing of such appeal; such notice shall be served in the same manner as a summons in error, and shall be returned within ten days after the officer receives the same, with the manner and time of service indorsed thereon. The fees for service of such notice shall be the same as allowed by law for serving summons in error, and shall be so taxed.

14. Whenever an issue of fact is presented for trial in an original action or proceeding, a commission will be named composed of two resident electors of the state of different political affiliations, who shall, under the direction of the court, select such number of persons having the qualifications of jurors in the district court as may be designated in the order for their appointment. A *venire* for the jurors so selected will be issued by the clerk, directed to the bailiffs of this court or any sheriff or sheriffs of the state, and shall be served in the manner prescribed for the service of summons. Said commissioners, before entering upon the duties of their office, shall take and subscribe to the oath prescribed by section 1 of chapter 10, Compiled Statutes.

15. Each party shall be entitled to three peremptory challenges, and challenges for cause may be made by either party, the validity of which shall be determined by the

court. If, from challenges or other cause, the panel shall not be full, the court may order the bailiff to fill the same from bystanders or neighboring citizens having the qualifications of electors.

16. The jurors summoned or called as above provided, or such of them as are not set aside or challenged as will make up the number of twelve, shall constitute the jury for the trial of said issue of fact.

17. Each juror shall be entitled to the same compensation and mileage as are provided by law for jurors in civil cases in the district court.

18. A syllabus of the points decided in each case shall be stated in writing by the judge or commissioner preparing the opinion, and such syllabus and opinion shall be examined and approved by the court before the same shall be reported.

19. The clerk of the court is answerable for all records and papers belonging to his office, and they shall not be taken from his custody unless by special order of the court, or a judge or commissioner thereof, but the parties may have copies when desired by paying the clerk therefor.

20. In all cases of application to this court for a writ of *mandamus*, a reasonable notice must be given to the respondent of the time when it will be made, accompanied by a copy of the affidavit on which it is based, unless for special reasons it is otherwise ordered.

21. Examinations of applicants for admission to the bar will be held on the second Tuesday of June and the third Tuesday of November each year.

22. Each applicant for admission shall, at least four weeks before the day set for the beginning of examinations, file with the clerk of this court a written request for admission in his own handwriting, subscribed by himself, together with proofs of his qualifications, as prescribed by section two (2) of an act for the admission to practice of attorneys and counselors at law, etc., approved March 30, 1895.

23. The proofs required under the foregoing subdivision shall be the applicant's affidavit as to his age, residence, and time and place of study, the certificate of his preceptor that the applicant has regularly and attentively studied law under such preceptor's personal direction and supervision for at least two (2) years, and the certificate or affidavit of at least two (2) citizens of good standing in the community where the applicant resides, or formerly resided, that they are well acquainted with him, that he is of good reputation in that community, and that they believe him to be of good moral character. If it be shown by the affidavit of the applicant that his preceptor is dead, or that for other satisfactory reasons his certificate cannot be obtained, there may be substituted therefor the certificate of any member in good standing of the bar of the county in which the applicant pursued his studies, and who may be personally cognizant of the facts.

24. None of the facts required for qualifying an applicant for admission shall be conclusively established by the foregoing proof, but the applicant shall in his application give the names and addresses of at least three (3) persons other than those whose certificates he presents, of whom inquiry can be made in regard to the applicant's character and other qualifications.

25. The applicant shall also, before the examination begins, deposit with the clerk the sum of five (\$5.00) dollars. The clerk shall enter all sums so received in a book or account kept for that purpose, showing date and name of applicant, and shall pay the same out on order of the Chief Justice, in payment of the expenses of such examination, and for no other purpose; that is to say, the cost of necessary printing and stationery; to the clerk for each oath and certificate of admission issued to an applicant, one dollar and fifty cents. To each member of the commission conducting the examination, his necessary traveling expenses, and for personal expenses while actually engaged in the performance of his duties, not exceeding five (\$5.00) dollars per day.

26. Any practicing attorney in the courts of record of another state or territory, having professional business in either the supreme or district courts of this state, may, on motion to such court, be admitted for the purpose of transacting such business, upon taking the required oath, as provided by section three (3), chapter seven (7), of Compiled Statutes. Any such attorney desiring to be admitted to practice generally in the courts of this state must make his application as required by these rules and present proof by certificate that he is a licensed practitioner in a court of record of such other state or territory.

27. The court will, on or before the opening of the September term in each year, appoint a commission composed of five (5) persons, learned in the law, to conduct examinations for the ensuing year.

28. The commission so appointed shall, prior to the examination, examine the proofs of qualifications filed in accordance with the foregoing rules, and may make such further investigation as to the qualifications of any applicant as it shall deem expedient. On the day appointed it shall commence the examination of applicants. The method of conducting the examinations shall be left to the discretion of the commission, it being expected that the commission will in the conduct of such examinations, and in the investigation of the qualifications of applicants, take care that no person shall be recommended for admission who has not in all particulars shown himself to be well qualified. Oral examinations shall be reported by the stenographer of this court.

29. As soon as practicable after the conclusion of the examination, the commission shall make a written report to the court of its conclusions, and all persons who shall be recommended for admission by a majority of the commissioners shall thereupon be admitted to practice, on taking the oath prescribed by law.

30. If an applicant shall be rejected, he shall not again be admitted to an examination for one year from the time

of such rejection, and until he shall file a certificate that he has studied law for one year since his rejection.

31. Graduates of the College of Law of the University of Nebraska shall make application and present proofs of qualifications in the same manner as other applicants. If found otherwise qualified by the commission, they shall be admitted without examination.

32. Only questions involved in matters of actual litigation before the court will be entertained or judicially determined, and no opinion will be filed in answer to any merely hypothetical question.

33. In all criminal cases brought on error to this court, where it appears that the court below has passed sentence of death upon the plaintiff in error, it is ordered that the sentence and judgment be suspended until the further order of this court, and it shall be the duty of the clerk to indorse such suspension upon the transcript filed in said cause and immediately transmit a certified copy thereof to the officer charged with the execution of said sentence.

See page lvii for table of Nebraska cases overruled.

The syllabus in each case was prepared by the judge or commissioner writing the opinion.

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CASES
ARGUED AND DETERMINED
IN THE
SUPREME COURT OF NEBRASKA.

JANUARY TERM, A. D. 1895.

PRESENT:

HON. T. L. NORVAL, CHIEF JUSTICE.

HON. A. M. POST,
HON. T. O. G. HARRISON, } JUDGES.

HON. ROBERT RYAN,
HON. JOHN M. RAGAN, } COMMISSIONERS.
HON. FRANK IRVINE,

**E. R. SPOTSWOOD & SON V. NATIONAL BANK OF
COMMERCE.**

FILED FEBRUARY 19, 1895. No. 5886.

- 1. New Trial: HEARING OF MOTION: EVIDENCE.** Where a motion for a new trial is made for parties on the grounds that they were never made parties to the action and never appeared therein and never authorized any attorney to appear for them, and that the attorney who claimed to represent them had no authority to do so, and that no proper defense had been made in their behalf, and that they possessed a full and adequate defense to the action which they desired to present, and affidavits are filed in support of and to controvert the grounds of such motion,

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it is proper for the trial judge, in determining the motion, to take into consideration matters of record which occurred during the trial of the case and have a bearing upon the issues to be determined in deciding the motion for a new trial.

2. **Review: BILL OF EXCEPTIONS.** Where the certificate to a bill of exceptions filed in this court, purporting to contain the evidence used on the hearing of a motion for a new trial, includes a statement that the evidence introduced and proceedings during the trial were considered in passing upon the motion, and the evidence and record of such proceedings are not preserved by the bill of exceptions, the question of the correctness of the ruling of the trial judge cannot be examined in this court, for the reason of the insufficiency of the bill of exceptions, and the findings of the trial court on the issues of fact involved in such hearing must be presumed to be correct and so treated.

ERROR from the district court of Douglas county. Tried below before DOANE, J.

John O. Yeiser, for plaintiffs in error.

B. N. Robertson, contra.

HARRISON, J.

This action was commenced in the district court of Douglas county June 7, 1890, the relief sought being to enjoin the defendant bank from collecting, or proceeding to collect, the balance of the amount of a promissory note, which we gather from the record was signed by Charles C. Spotswood as principal debtor and E. R. Spotswood & Son as surety. The petition was apparently filed in the interests of both principal and surety, signers of the note. The petition was so entitled and was signed by an attorney under the names of both parties, and by him as their attorney. A restraining order was allowed and a time fixed for hearing, and as a result of the hearing, which was had in due course of the proceedings, the following order was made: "And now, on this 18th day of July, 1890, on hearing the application for the injunction prayed for in the above en-

titled cause, and on hearing the affidavits on file both in support of and against said injunction, it is hereby ordered that the temporary injunction prayed for be, and the same is hereby, allowed and granted as prayed for in the petition filed herein, to continue in force and effect until this cause can be finally heard in its regular order, and the issues in this case fully determined, upon condition, however, that the plaintiff file a good and sufficient bond, to be approved by the clerk of this court, in the sum of \$300, and on the further condition that within five days the firm of E. R. Spotswood & Son, mentioned in the petition, enter an appearance herein of record, and become a party plaintiff in this suit, and leave is hereby given to amend the petition now on file herein by interlineation for the purpose of making the said E. R. Spotswood & Son a party plaintiff herein." Answer and reply were filed, and on a trial of the issues judgment was rendered in favor of defendant, and granting it affirmative relief in the amount of the balance the court found from the evidence was due it on the note. This was of date January 18, 1892, and on the same day a motion for new trial was filed by Charles C. Spotswood and a separate motion for new trial in behalf of E. R. Spotswood & Son, in which it was recited that E. R. Spotswood & Son did not commence the action, were not served in any manner, and did not voluntarily appear or submit to the jurisdiction of the court by attorney or in person, and never authorized the attorney who apparently represented them or any other attorney to appear for them in said cause, and had no knowledge that any one had so appeared, or that they had been made parties to the suit until after judgment was rendered; that they had been deprived of the right to their day in court, and to make a full and adequate defense to the action which they possessed. These motions for new trial were overruled, the order in reference to that of E. R. Spotswood & Son being as follows: "This cause coming

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on to be heard on the motion of E. R. Spotswood & Son, of Lexington, Kentucky, a firm composed of S. P. Spotswood and O. N. Spotswood, the plaintiffs herein, for a new trial of said cause, the affidavits of O. N. Spotswood, John P. Breen, and John O. Yeiser, and was submitted to the court, on consideration whereof the court finds that the said John P. Breen, attorney, was duly authorized to represent the said E. R. Spotswood & Son on the trial of said cause, and did in fact so represent them with their knowledge and consent, and that the matters in controversy herein have been fully adjudicated herein. It is therefore considered by the court that the said motion be, and the same is hereby overruled, to which the defendants E. R. Spotswood & Son except." And a petition in error has been prosecuted to this court for E. R. Spotswood & Son, to secure a review of the rulings of the trial judge upon their motion for a new trial.

In settling the bill of exceptions the following record was made:

"Received of John O. Yeiser, attorney for E. R. Spotswood & Son, the above proposed bill of exceptions to the rulings of the court on the motion for a new trial by E. R. Spotswood & Son for amendments this 25th day of May, 1892.

CORNISH & ROBERTSON,

"Attorneys for National Bank.

"I hereby return the within bill of exceptions, but refuse to approve of the same, for the reason that the affidavit of John O. Yeiser was not read, but by consent he was permitted to state its contents and thereafter file the same, provided he would also file his written authority to appear for E. R. Spotswood & Son. This last he has not done. Defendant further objects to this bill of exceptions for the reason that no bill of exceptions has ever been prepared and served upon this defendant showing the evidence received upon the trial of this cause, although such bill of exceptions (had it been prepared) would have shown that

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the matters of defense set forth in said motion for new trial were fully presented and determined at said trial and the said E. R. Spotswood & Son were then fairly represented and the time for filing such bill of exceptions has long since elapsed.

“NATIONAL BANK OF COMMERCE,
“*Defendant,*
“BY CORNISH & ROBERTSON,
“*Its Attorneys.*

“Received above June 2, 1892. JNO. O. YEISER.”

The certificate of the judge was as follows: “The foregoing three affidavits was all the evidence offered and given by either party on the hearing of the said motion for a new trial by E. R. Spotswood & Son, and, on application of the said E. R. Spotswood & Son, this bill of exceptions is allowed by me, and ordered to be made a part of the record in this case; and I further certify that in passing upon said motion for a new trial I considered all the evidence and proceedings upon the trial of the case in addition to said affidavits,” and was dated and signed. The foregoing certificate was type-written matter from the first word “The,” to and including the word “case,” where it first appears in the certificate. The remainder, from the word “and,” immediately following the word “case,” to the end of the body of the certificate, was in handwriting, presumably, from all indications contained in the record, that of the judge who signed the certificate. From this it will be seen that we have not now before us all the evidence which the judge who passed upon the motion for a new trial considered in deciding such application. The testimony contained in the affidavits which were filed and used at the hearing of the motion was conflicting, and whatever it was, if anything, contained in the record made during the trial bearing upon the questions decided in passing upon the motion, *i. e.*, the appearance or non-appearance of E. R. Spotswood & Son or their representation by attor-

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ney, and his authority or want of authority so to do and the care then taken of their interests, which assisted the trial judge in reaching a conclusion, we cannot say, as it is not before us, nor can we say whether it was sufficient, when coupled with the evidence in the affidavits, to warrant his conclusion. As to the propriety of the judge considering what may have appeared in the record of the trial bearing upon the questions presented by the motion, we have no doubt. The complaint was made that plaintiffs in error were not represented in the case or during the trial, and if any one claimed to appear for them it was without authority. If anything transpired during the trial which would assist in determining the controversy it was undoubtedly competent for such purpose and proper to be considered and given its due weight by the court. It is a settled rule that every presumption is in favor of the correctness of the proceedings of a trial court, and error will not be presumed, and it must affirmatively appear that all the testimony submitted or considered at any hearing by a trial court is contained in the bill of exceptions. (*Aspinwall v. Sabin*, 22 Neb., 76.) We think this rule is applicable to a hearing upon a motion for a new trial, at least in a case such as the one at bar, where it appears affirmatively from the certificate of the presiding judge that a portion of the record which it was entirely proper for him to consider was not preserved by the bill of exceptions. The judgment of the district court is

AFFIRMED.

NELSON & COOK V. JOHN F. JOHNSON.

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FILED FEBRUARY 19, 1895. No. 6016.

1. **Review: RULINGS ON EVIDENCE: BILL OF EXCEPTIONS.** Where it is sought to present for review alleged errors of a trial court in receiving or rejecting testimony, and also the applicability of an instruction to portions of the evidence, it is necessary that there be a properly authenticated bill of exceptions.
2. **Bill of Exceptions: ALLOWANCE BY CLERK.** A clerk of the district court has no power to settle and allow a bill of exceptions unless it is within the exceptions noted and provided for in section 311 of the Code of Civil Procedure.
3. **Continuance: AFFIDAVITS: REVIEW.** Affidavits used on the hearing of a motion for a continuance cannot be considered in the appellate court unless preserved by a bill of exceptions.
4. **Instructions: REVIEW.** An instruction which was a correct statement of the rule of law applicable to a certain class of testimony, the absence of a properly authenticated bill of exceptions precluding its examination in connection with the evidence, presumed to be without error.

ERROR from the district court of Burt county. Tried below before IRVINE, J.

H. H. Bowes, for plaintiffs in error.

N. J. Sheckell, contra

HARRISON, J.

This action was commenced by plaintiffs against defendant, in the district court of Burt county, to recover the sum of \$—— and interest thereon, alleged in the petition to be the balance due them on an account. The answer pleaded payment. There was a trial and verdict and, after motion for new trial overruled, a judgment for defendant, to reverse which this error proceeding was instituted in this court.

A number of the errors complained of in the petition refer to the overruling or sustaining of objections to questions during the introduction of the testimony. These we cannot examine, for the reason that there is no properly authenticated bill of exceptions in the record. There appears the following stipulation: "It is hereby agreed that F. E. Ward, clerk of the district court, may settle the bill of exceptions herein and allow the same." According to this agreement the clerk of the district court signed the following statement in the record: "In pursuance of the agreement of the attorneys aforesaid the petition in error and bill of exceptions hereto attached are hereby allowed as the true and correct record upon which this cause was tried." This was not sufficient. In *Scott v. Spencer*, 42 Neb., 632, in an opinion written by RAGAN, C., in which an exactly similar question was passed upon, it was said: "Section 311 of the Code of Civil Procedure provides: 'In case of the death of the judge, or when it is shown by affidavit that the judge is prevented by sickness, or absence from his district, as well as in cases where the parties interested shall agree upon the bill of exceptions and shall have attached a written stipulation to that effect to the bill, it shall be the duty of the clerk to settle and sign the bill in the same manner as the judge is by this act required to do.' To confer authority upon the clerk of a district court to sign and allow a bill of exceptions, then, it must appear that the judge of the district court is dead, or that he is prevented by sickness or absence from his district from signing and allowing the bill, or the parties to the litigation or their counsel must agree upon the bill of exceptions, and attach thereto their written stipulation to that effect. Counsel for the parties to this litigation did agree and stipulate that the clerk might sign the bill of exceptions, but they did not agree by stipulation in writing attached to the bill that it was the correct bill of exceptions in the case. Where it is sought to present to this court alleged errors occur-

ring at a trial in the district court, a bill of exceptions, settled and signed by law, is indispensably necessary;" citing *Reynolds v. Dietz*, 39 Neb., 180; *Edwards v. Kearney*, 14 Neb., 83. (See, also, *Glass v. Zutavern*, 43 Neb., 334.)

One ground assigned as a reason for reversing the judgment is the overruling of plaintiffs' motion for a continuance. The granting or refusal of a motion for a continuance is a matter which is discretionary with the trial court, and, judged by the record, there was no abuse of discretion in refusing a continuance in this case. It will not be presumed that the action of the court was erroneous, and if there is nothing in the record from which it appears that the decision was wrong, it will be approved. There are some affidavits in the record which were probably used on the hearing of the motion for a new trial, but they are not identified as having been so used and are not preserved by a bill of exceptions, which renders them unavailable in this court. (*Barton v. McKay*, 36 Neb., 632, and cases cited.)

The only other assignment of error is that the court erred in giving paragraph five of the instructions to the jury, given on its own motion. The instruction attacked was as follows: "The books of account kept by Fried were received in evidence and are to be accorded such weight as under the circumstances you think them entitled to. The plaintiffs have also put in evidence certain admissions alleged to have been made by defendant in regard to the account. Such admissions are to be received with caution, but you should consider them in connection with the other evidence and give them such weight as you think them entitled to." The portion of the instruction to which counsel for plaintiffs objects is contained in the words, "such admissions are to be received with caution," which he claims does not correctly state the law. In the case of *Kelman v. Culhoun*, 43 Neb., 157, in an opinion written by Post, J., this court said in reference to admissions: "It

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has been said that mere verbal admissions should be received with caution. That such evidence, 'consisting, as it does, in the mere repetition of oral statements, is subject to much imperfection and mistake' (1 Greenleaf, Evidence, 200), although admissions, deliberately made and precisely identified, may afford proof of the most satisfactory character." From the above it is clear that as to one class of admissions the rule announced by the court, to which exception was taken, was entirely pertinent and applicable. Whether the admissions to which the attention of the jury was by it directed were such as came within its terms could only be determined by an examination of the testimony in which they were contained, and as this was not preserved in a bill of exceptions in a manner authorized by law, it cannot be used for this or any other purpose, and, applying the rule that error will not be presumed but must affirmatively appear, the action of the court in giving the instruction designated must be upheld. It follows that the judgment of the district court will be

AFFIRMED.

IRVINE, C., not sitting.

JOSEPH VLASEK V. WILLIAM WILSON.

FILED FEBRUARY 19, 1895. No. 6038.

Justice of the Peace: BILL OF EXCEPTIONS: REVIEW. No ground of complaint in this case being disclosed independently of a bill of exceptions settled by a justice of the peace, the judgment rendered by said justice of the peace without the intervention of a jury will not be disturbed, since that magistrate had no power to settle such indispensable bill of exceptions. Following *Moline, Milburn & Stoddard Co. v. Curtis*, 38 Neb., 520, and other cases thereon predicated.

ERROR from the district court of Lancaster county.
Tried below before TUTTLE, J.

Pound & Burr, for plaintiff in error.

Sawyer, Snell & Frost, contra.

RYAN, C.

From a transcript it appears that the defendant in error began a suit before A. D. Borgelt, a justice of the peace of Lancaster county, to recover damages on account of the killing of some live stock by a dog owned by the plaintiff in error. A summons was issued June 21, 1892, and was delivered to E. Hunger, a constable, for service. This was returned served on Joseph Vlasek June 22, 1892. The return of this service was signed "T. A. Hayes, dept. constable." The sole contention of plaintiff in error is that this service did not confer jurisdiction, and that his motion to quash the return should have been sustained, because, as claimed, there was a showing that T. A. Hayes was deputized by the constable and not by the justice of the peace who issued the summons. In the transcript of the docket entries of the justice of the peace there is, as to this matter, nothing more than above stated, and it is clear that the facts claimed to exist are not made to appear thereby. We cannot resort to the alleged bill of exceptions for the data necessary to establish as facts the assertions in the brief of plaintiff in error as to the true history of the authorization of T. A. Hayes to act as deputy constable, for under the circumstances the justice of the peace had no power to settle a bill of exceptions. (*Moline, Milburn & Stoddard Co. v. Curtis*, 38 Neb., 520; *Hopkins v. Scott*, 38 Neb., 666; *Real v. Honey*, 39 Neb., 516.) We cannot, therefore, say that the justice of the peace improperly overruled the motion to quash the return of service and that the rendition of judgment by him was without jurisdiction. The judgment

Hines v. Cochran.

of the district court affirming the judgment rendered by the justice of the peace is, in its turn

AFFIRMED.

THOMAS J. HINES, APPELLEE, v. CHARLOTTE COCHRAN
ET AL., APPELLANTS, AND PHILADELPHIA MORT-
GAGE AND TRUST COMPANY ET AL., APPELLEES.

FILED FEBRUARY 19, 1895. No. 5480.

1. **Mechanics' Liens.** The evidence in this case examined, and held to sustain the decree of the district court, except as to the claim of J. A. Fuller & Co.
2. ———. In respect to the rights of J. A. Fuller & Co., the case of *Byrd v. Cochran*, 39 Neb., 109, involving the same questions, is held decisive.

APPEAL from the district court of Douglas county.
Heard below before HOPEWELL, J.

B. F. Cochran and *B. G. Burbank*, for appellants.

Montgomery, Charlton & Hall, Wharton & Baird, and
John O. Yeiser, contra.

RYAN, C.

In the district court of Douglas county Thomas J. Hines commenced this action against Charlotte Cochran for the foreclosure of a mechanic's lien on account of plastering and mason work alleged to have been done by him, as a subcontractor, in the erection of a building on premises owned by the said defendant. There were made defendants the Philadelphia Mortgage & Trust Company, the holder of a mortgage on the aforesaid premises, William M. Bell, the principal contractor for the erection of the house aforesaid, and Herman E. Cochran, the husband of Charlotte

Hines v. Cochran.

Cochran. The amount claimed was \$594.40, for which sum plaintiff prayed a personal judgment against Charlotte Cochran and William M. Bell. After the commencement of this action the Bohn Sash & Door Company intervened, and, by virtue of an assignment by Bell of a claim for a mechanic's lien which he held as the principal contractor, asked to be subrogated to his rights, and in such rights prayed a foreclosure for the sum of \$1,053.82, the balance alleged to be due to Bell. J. A. Fuller & Co. also intervened and sought the foreclosure of a claim assigned to said firm by a subcontractor, Joe Johnson, in the sum of \$88.75, for the painting done on said house. On a trial duly had there was a decree in favor of Thomas J. Hines in the sum of \$5. This amount was all that he was entitled to; under one theory sustained by sufficient evidence, and it will therefore be passed without further consideration. The court found due the Bohn Sash & Door Company but \$672.20, and decreed in its favor a lien for that amount, subject to the lien of the Philadelphia Mortgage & Trust Company by virtue of its mortgage. The contentions which arise in respect to this claim are three in number. As against any right to a lien it is insisted that the Bohn Sash & Door Company, before the work was begun, executed a written waiver of its right to claim or enforce a lien. It is urged that the above mentioned mortgagee made the loan it did to Mrs. Cochran, greatly influenced by this fact, and that to permit the Bohn Sash & Door Company now to enforce a lien would not be just. This company does not claim a lien in its own right for material furnished by it. The evidence shows, as its name implies, that it is within the scope of the business of the Bohn Sash & Door Company to furnish manufactured building material of certain kinds. Its agreement was made in view of that fact and inhibited only the filing of the claim for a lien when it was for material by it furnished. In this case the claim of Mr. Bell was for a general balance due him on his contract to

furnish the material and erect the building in contemplation. His claim was complete, and all steps required by statute to entitle him to a lien had been complied with before his assignment of it to the Bohn Sash & Door Company. It is true the interim between the filing of this claim and the assignment thereof was of only about fifteen minutes duration, yet the proof was sufficient to justify the conclusion that the lien was in fact perfected before the assignment was made. The agreement of the Bohn Sash & Door Company did not forbid that company's acquisition of a claim already due and owing, but it was that it would not assert a claim on account of material furnished by itself. A complaint made by the Bohn Sash & Door Company and Mr. Bell is that from the claim assigned by the latter to the former, there was a deduction of the sum of \$93, an amount paid by the husband of Charlotte Cochran to the firm of Ittner & Cassell for brick furnished and used in the erection of the building of Mrs. Cochran. Mr. Bell testified that this payment was made by Mr. Cochran, the agent of Mrs. Cochran, notwithstanding the fact that before such payment he had informed Mr. Cochran that this bill had, by himself, been fully paid. Mr. Cochran on the other hand testified that a member of the firm of Ittner & Cassell demanded payment of this bill in the presence of Mr. Bell, and that, with Mr. Bell's approval, he, the said Mr. Cochran, paid it. As the firm of Ittner & Cassell was a subcontractor under Mr. Bell it was proper that Mr. Cochran should make payment directly to said subcontractor, if the facts were as stated in the testimony of Mr. Cochran. On conflicting evidence it must be presumed that the conclusion found by the district court was correct and, therefore, this was a duly authorized payment. The Bohn Sash & Door Company claim that Mr. Bell had begun the construction of the aforesaid building before the mortgage of Mr. and Mrs. Cochran to the Philadelphia Mortgage & Trust Company was filed for record, and that, therefore, the dis-

strict court unjustly postponed the lien acquired by Mr. Bell to that of the aforesaid mortgagee. The evidence adduced on only one, and no matter which, side of this question of fact seems absolutely unanswerable. The proofs on the other side afford so complete a demonstration of its correctness that we cannot but be surprised that the district court, upon consideration of the evidence on both sides, could find any preponderance in favor of either. Under such circumstances we must assume that the manner of the witnesses, or some other circumstances of which we have not the advantage of knowledge, destroyed this apparent equilibrium. As the finding of the district court was in favor of the mortgagee it must remain undisturbed.

In the case of *Byrd v. Cochran*, 39 Neb., 109, there were considered the rights of J. A. Fuller & Co., as assignee, of the claim of Joe Johnson for painting by him done on the house erected by E. G. Cochran. In that case Johnson's contract was for the painting of two houses. One of these was in course of erection by E. G. Cochran when this contract was made, the other was the one involved in this case. The right of J. A. Fuller & Co., as the assignee of Joe Johnson for painting by him done on the house of E. G. Cochran, was denied in the case of *Byrd v. Cochran, supra*. As the facts in that case were necessarily the same as those in this, in so far as thereby are to be determined the rights of Fuller & Co., it is unnecessary to repeat them. In the case at bar there is no occasion for doing more than to quote the second paragraph of the syllabus in the case of *Byrd v. Cochran, supra*, for thereby is correctly given the status, and fully stated the rights, of J. A. Fuller & Co. This paragraph is in this language: "When a subcontractor paints two separate houses and furnishes the paint and other materials necessary for use in the painting, contracting for such work and materials with the original contractor, the consideration for such agreement being in one sum for both jobs, in order to recover upon a mechanic's

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lien filed against one of the houses and the lot upon which it stands, it must be shown that the amount charged against the one house and lot is the value of the labor performed upon and materials furnished for such house, or an estimate made by some method or plan which will produce a certain definite result, and mere approximation or guesswork will not suffice to establish the lien." The court erred in allowing this lien, and to that extent its decree must be reversed. In all other respects its judgment is affirmed and the cause is remanded with directions to the district court to enter a decree in conformity herewith.

JUDGMENT ACCORDINGLY.

IRVINE, C., not sitting.

WILLIAM J. BURGESS ET AL. V. N. E. BURGESS.

FILED FEBRUARY 19, 1895. No. 4434.

1. **Trial: ADMISSION OF EVIDENCE: HARMLESS ERROR.** Prejudicial error will not be implied from the introduction in evidence of a petition verified by affidavit, in which petition were contained only such statements as were afterwards by said affiant repeated on his oath in the course of the trial in which such petition was introduced in evidence, and in relation to which statements there was thereupon accorded and fully exercised the right of cross-examination.
2. **Evidence: LETTERS.** Where the handwriting in which was affixed the signature to a letter was identified as that of one of the parties to the action on trial, such letter, if otherwise competent and relevant, is admissible in evidence, even though the signature thereto is denied by the testimony of the party charged with writing it.
3. **Trial: OPENING AND CLOSING.** Where, with the tacit consent of his adversary, a party litigant had assumed the burden of proof until the case was ready for presentation to the jury, the

Purgess v. Burgess.

refusal of the district court at that stage of the proceedings to permit the hitherto consenting party to open and close is fully approved.

ERROR from the district court of Gage county. Tried below before APPELGET, J.

L. W. Colby and R. S. Bibb, for plaintiffs in error.

L. M. Pemberton and Griggs & Rinaker, contra.

RYAN, C.

This action was tried in the district court of Gage county as an appeal from the probate of the will of Sophia A. Burgess. The contestant was a son of said decedent, whose legacy was but \$10. There were two sisters and one brother of the contestant, who made common cause with him, since each was entitled to a legacy of like amount. The residue of the property of the deceased,—eighty acres of lands and perhaps some debts due her,—by the will was to be distributed among two sisters and one brother of the contestant. The objections to the probate of the will were that the testatrix was at the time of the execution thereof unduly influenced by the favored devisees and not of sound mind and competent to dispose of her property. There was a general verdict in favor of the contestants, as well as the following special findings:

“Do you find from the evidence that the testatrix at the time of the making of the will in controversy was possessed of sufficient mental capacity to understand the extent and the nature of the business in which she was engaged? Answer: No.

“Do you find from the evidence that the testatrix, Sophia Burgess, was constrained or coerced through undue influence or restraint in making the will in question? Answer: Yes.”

The trial of this cause was one of those interesting ex-

hibitions sometimes given with respect to the distribution of property among the individual members of a family in which there is displayed more zeal than affection. There was sufficient evidence from which the jury might properly find, as they did both generally and specially. It would be unnecessary to discuss any details if complaint had not been made by plaintiffs in error as to certain rulings in the course of the trial. One of these was as to the introduction in evidence of a copy of the petition filed during the lifetime of the testatrix asking for the appointment of a guardian of her person and estate. This petition was sworn to by the contestant, N. E. Burgess, and by Henry Richardson the husband of one of the legatees who now assists in the contest. On the trial of this case there was evidence that the testatrix had been prejudiced against these petitioners by representations to her made by the proponents, that said N. E. Burgess and Henry Richardson had procured the latter to be appointed her guardian by filing a petition in which she was described as crazy,—a descriptive term as applied to herself to which she had decided objections. A letter of one of the daughters of the testatrix, who favored the contest, was on the trial, by the proponents introduced in evidence. In this letter the writer had expressed a decided disapproval of the then pending proceedings for the appointment of a guardian because, as she therein insisted, her mother was not insane. The essential averments of the petition for a guardian were that by reason of Mrs. Burgess' age and the enfeebled condition of her mind she was not mentally competent to have the charge and management of her property. As both N. E. Burgess and Henry Richardson testified orally on the trial and were fully cross-examined as to the above propositions—the only material ones contained in the petition for guardianship—it is not perceived just what prejudice resulted from its introduction in evidence. Indirectly it contradicted the representations made to the testatrix according to some evidence

introduced, and contributed an explanation of what seemed contradictions between the epistolary and oral statements of the writer of the letter above referred to. Probably these last considerations would not, however, have been a sufficient justification of the admission of this evidence, if, by the said petition, there had been presented to the jury material independent statements of facts, as to which there was offered no opportunity of cross-examination on the trial of the case.

It is urged that there was error in permitting to be introduced in evidence a letter signed W. J. B. It is true William J. Burgess, one of the proponents of the will, testified that he never signed by his initials, and that he did not think the above initials were in his handwriting. The statements in the letter which seem to have been regarded as material were that oath had been made in the aforesaid petition for guardianship that Mrs. Burgess was insane, and in that connection it was affirmed in the letter that the appointment of Mr. Richardson, as guardian, had been brought about so that Richardson might "make a raise" on the old lady's property. These charges were followed by threats of measures not described, but which would defeat the plans above referred to. The denial of the signing of the initials was somewhat qualified by Mr. Burgess and made to depend to a considerable degree upon the general proposition that he never signed by his initials alone. It was doubtless regarded as important by him that there should not be conveyed to the jury the impression that the making of the will, under which he was a beneficiary, was, in any way, brought about through his influence. There was, therefore, an inducement to deny that he was the author of the letter which seemed to indicate that, in his mind, there had existed, before the will was made, an intention to influence his mother to punish Mr. Richardson for making oath that she was insane. It would afford a dangerous precedent to hold that where the alleged writer of a letter denied that the sig-

nature thereto was in his handwriting, no other evidence was competent as to the genuineness of such signature; yet this is, in effect, the contention of the plaintiffs in error, for it is shown by the bill of exceptions that at least three witnesses, well acquainted with the handwriting of W. J. Burgess, testified that from such knowledge they were able to say, and did say, that he signed the initials in question. Under these circumstances the court properly allowed the letter to go to the jury.

From the outset of the trial to the close of the rebutting evidence the contestant by common consent was recognized as the proper party to open and close. After the completion of the contestant's rebuttal the proponents asked to be allowed to introduce evidence in rebuttal thereof, which the court refused. There was no explanation made as to what evidence would have been offered if this request had been granted. We cannot conjecture what proofs could have been tendered, for the rebuttal which it was proposed to rebut was confined to contradictions of matters of evidence introduced on the defense by the proponents. Immediately after this ruling was made the proponents asked the privilege and claimed the right to open and close the argument to the jury. As to this the court said: "I think if the case had been tried on that theory all the way through, it would have been all right, but we will not change the arrangement now." In this view expressed by the court we concur, and, even if we differed on this proposition, there would under the circumstances be no interference with this ruling, for the order of trial must largely be left to the discretion of the presiding judge. (*Goodman v. Kennedy*, 10 Neb., 274; *Village of Ponca v. Crawford*, 18 Neb., 555; *Omaha Southern R. Co. v. Beeson*, 36 Neb., 361.)

The petition in error calls in question the correctness of certain instructions, and as to others alleges that there was error in refusing to give them as requested. Each of these

assignments is directed to a group and not to any single instruction. Aside from this, there is in the brief of plaintiff in error no attempt to point out in what respect there was error in either the giving or refusal complained of. These assignments in the petition in error must, therefore, be deemed waived. (*Brown v. Dunn*, 38 Neb., 52; *Gill v. Lydick*, 40 Neb., 508; *Glaze v. Parcel*, 40 Neb., 732.) The judgment of the district court is

AFFIRMED.

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OMAHA CONSOLIDATED VINEGAR COMPANY, APPELLANT, v. JOSEPH BURNS, APPELLEE.*

FILED FEBRUARY 19, 1895. No. 5473.

1. **Contract: MECHANIC'S LIEN FOR SINKING WELL: FORECLOSURE.** One who predicates his right to relief upon the alleged performance by him of all the terms of a written contract must show a substantial compliance with each requirement thereof, where there has been neither a waiver nor acceptance of benefits thereunder by the other contracting party.
2. **Pleading.** A party is not allowed to allege in his petition one cause of action and prove another upon the trial. The *allegata* and *probata* must agree. Following *Imhoff v. House*, 36 Neb., 28.

APPEAL from the district court of Douglas county.
Heard below before HOPEWELL, J.

Mahoney, Minahan & Smyth, for appellant.

Chas. Offutt, contra.

RYAN, C.

It is necessary to refer to the petition originally filed in the district court of Douglas county merely to explain the

* A rehearing was allowed.

existing attitude of the respective parties to the subject-matter in litigation. Originally there was filed in the office of the register of deeds of said county an affidavit of the defendant Joseph Burns for a mechanic's lien on account of sinking a well on real property of the plaintiff in Omaha. The petition in the first instance filed herein was for the purpose of having the aforesaid claim of lien removed as a cloud on the title of plaintiff. The defendant by his answer, in the nature of a cross-petition, asked the foreclosure of the lien claimed, as though the cross-petition had been the first pleading filed, and thereafter the action proceeded as though it was one brought for such a foreclosure by the defendant. From a decree in favor of the defendant, granting for the most part the relief prayed, the plaintiff has appealed.

By his cross-petition the defendant averred that plaintiff, through its president, its duly authorized agent, entered into a contract in writing, of which the following is a copy:

"SEPTEMBER 11, 1890.

"JOSEPH BURNS: Please sink a tubular well, seven-inch lap-welded iron pipe, at our vinegar factory at Omaha, and continue sinking the same until you get a water supply of 2,000 gallons of water per hour, unless sooner stopped by us. You to furnish all pipe points, point, and working barrel and valves, together with plunger rods and all other material necessary to construct and complete the well in a first-class manner to the surface of the ground, and on the completion of the work we agree to settle for same at the rate of five dollars (\$5) per foot; one-half to be paid in cash and the balance to be paid by our note of ninety days without interest. We will furnish at our own expense the pump, or whatever we may decide to use to raise the water with. It is the understanding that you pay all bills for labor and material necessary to complete the work as above, for the above prices, and should the well have to be sunk below 250 feet, then the price shall be six dollars per foot below

the first 250 feet or for the second 250 feet or any part thereof that it may be necessary to sink the well to obtain the necessary amount of water; and it is further understood that in no case shall the well be sunk deeper than 500 feet deep at this price from the surface of the ground. It is the understanding that when the well is completed as above it shall be paid for as first mentioned, namely, one-half cash and the balance in note as above.

“J. H. BARRETT, *Pres.*”

Immediately following the reference in the cross-petition to the above contract attached as an exhibit there were the following averments:

“4. And this defendant alleges that thereupon and in pursuance of said contract he sank a well on said lots or premises, being the same identical premises upon which the buildings, machinery, and manufactory so as aforesaid erected by plaintiff, stood and were situated, and that in sinking said well this defendant did work and furnished material between the 24th day of September, 1890, and the 13th day of January, 1891, inclusive, amounting in the aggregate, according to the terms of said contract, to the sum of \$2,890, and that this defendant further performed all the terms and conditions of said contract on his part to be performed.”

There was no other description of the manner in which the defendant had entitled himself to the foreclosure prayed, except that there were the usual averments of the filing of a verified account for a mechanic's lien as required by statute. The prayer of the cross-petition was that an accounting might be had of the amount due from plaintiff to defendant; that such amount should be adjudged and decreed to be a valid and subsisting lien upon said premises; that defendant should have judgment against plaintiff for the sum of \$2,890, with interest thereon from the 7th day of February, 1891, the day on which was filed the claim of defendant for a lien; that said premises be sold and the

proceeds thereof applied to the payment of such judgment, interest, and costs as should be rendered in behalf of the defendant; that in case such proceeds should be insufficient to fully satisfy the amount found to be due and owing to the defendant, plaintiff might be adjudged to pay the deficiency, and that the defendant might have such other and different relief as in justice and in equity he should be entitled to. The district court made findings, among others, as follows:

“That on the 11th day of September, 1890, the plaintiff made, and the defendant accepted, the written proposition, dated September 11, 1890, and set out in the answer and cross-petition of the defendant; that by the terms of said proposition, which was accepted as aforesaid, the plaintiff employed the defendant to sink a tubular well of seven-inch lap-welded iron pipe at the plaintiff's vinegar factory at Omaha, Nebraska, and to continue to sink the same until the defendant should get a water supply of two thousand gallons of water per hour, unless sooner stopped by the plaintiff; that said well, by the terms of said contract, was required to be cased from top to bottom with lap-welded iron pipe, seven inches in diameter on the inside; that said contract might be performed by the defendant either (1) by sinking a well and casing the same with lap-welded iron pipe of the size aforesaid until the defendant secured thereby a water supply of two thousand gallons of water per hour, or (2) until stopped by the plaintiff; that the defendant in good faith undertook the execution of said contract and proceeded in the performance of the same in a proper and workmanlike manner, and that, in so doing, the defendant sank a seven-inch tubular pipe a distance of one hundred and forty-five feet from the surface of the ground, at which point the defendant struck a hard limestone formation sixty-five feet in thickness; that the defendant then proceeded through said rock formation and extended it a number of feet with a hole seven inches in

diameter, and at the bottom of said hole proceeded further with a hole six and then five inches in diameter, until he reached a point five hundred and twenty feet below the surface of the ground, at which time the defendant determined to ream out and make larger the hole where it would not receive a pipe seven inches in diameter, and to carry the seven-inch pipe down the distance of three hundred and eighty-five feet from the surface of the ground with a view of extending the depth of the well below said five hundred and twenty feet and until the supply of water aforesaid was reached; that while the defendant was proceeding with said work as aforesaid, and before he secured the amount of water required to perform the conditions of said contract, the plaintiff stopped the defendant from work and compelled him to leave the premises and to remove his working tools and materials therefrom, and by reason thereof the defendant was unable to longer continue said work, though the defendant was then willing and in good faith offered to continue the same and to complete said well from top to bottom cased with lap-welded iron pipe, seven inches in diameter, inside measurement; that by the terms of said contract, upon the performance of the same, the defendant was entitled to receive from the plaintiff the following amounts:

“ For the first 250 feet, \$5 per foot, a total of..... \$1,250

“ For the second 250 feet, \$6 per foot, a total of... 1,500

“ That is to say, a total for the 500 feet of..... \$2,750

“ That when the plaintiff stopped the defendant, said well was not complete a distance of five hundred feet from the surface of the ground, but that the work which had been done below the one-hundred and forty-five feet from the ground was a part of the whole work contracted for, and was properly done in order to sink said well a distance of five hundred feet from the ground with lap-welded iron pipe, seven inches in diameter, inside measurement, from

Omaha Consolidated Vinegar Co. v. Burns.

top to bottom, and in order to enlarge the said well and sink a seven-inch pipe from top to bottom, and to complete the same with the equipments provided for in said contract, the following work and material of the value, as follows, was necessary, that is to say: That the work to enlarge said hole so as to receive a seven-inch pipe from top to bottom was fairly and reasonably worth the sum of..... \$100 00

“That it would require an additional 355 feet of seven-inch pipe at \$1.10 per foot, making a total of..... 390 50

“That it would require a working barrel of the value of..... 60 00

“That it would require a point to said pipe of the value of..... 30 00

“That it would require a plunging rod of the value of..... 14 00

“Making a total amount of work, material, and equipments necessary to complete said well, in addition to what had been done as aforesaid, the sum of..... \$594 50

“The court therefore finds that the defendant is entitled to recover in this case such proportion of the whole contract price of \$2,750 as the work done bore to said contract price, and that, therefore, that the work done was of the value of \$2,750, less the said sum of \$594.50, the total of \$2,155.50; that the defendant is entitled to interest thereon from the 7th day of February, 1891, until the first day of the present term of court, that is to say, September 21, 1891, seven months and a half, which said interest, at the rate of seven per cent per annum, makes the sum of \$94.27, and that the total amount of the defendant's recovery, with interest to the first day of the present term of court should be the sum of \$2,249.77.”

The above quoted findings, as far as they go, correctly reflect the evidence as adduced by the defendant, except that

the diameters of the extensions were five and four inches instead of six and five, as incorrectly stated. They, therefore, except as suggested, will be accepted as a correct, though not complete, history of the transactions described. This neither concludes us as to the construction proper to be placed upon the contract referred to, nor with reference to the rights or liabilities of the respective parties thereunder. The language of the contract required the defendant to "sink a tubular well, seven-inch lap-welded iron pipe, and continue sinking the same until you get a water supply of 2,000 gallons of water per hour, unless sooner stopped by us." The district court held that as plaintiff stopped the defendant from work and compelled him to leave the premises and to remove his tools, by reason whereof defendant was unable to longer continue said work, the plaintiff was liable for the contract price of sinking 500 feet, that is, \$2,750, less the items above specified, amounting to \$594.-50, which would be required to enlarge the hole so that it would be seven inches in diameter throughout the entire 500 feet and provide the additional seven-inch casing thereby rendered necessary, as well as certain equipments required for hoisting water. Very soon after the service of notice upon him to quit work the defendant, in writing, acknowledged receipt of said notice, and thereupon offered to enlarge the well and put in a seven-inch pipe the whole depth, in order as the acknowledgment recited, to fix and determine the price to be paid the said defendant. As the district court construed the contract to require that a well seven inches across should be sunk its entire depth, and as this was the construction also adopted by Mr. Burns, it is with more perfect confidence that we adopt the same understanding, which, independently of these considerations, we believe is the natural import of the language used. But this was not the only requirement, for there were to be supplied 2,000 gallons of water per hour unless Mr. Burns was sooner stopped by the other contracting party. The

district court seems to have assumed that compliance with this requirement was prevented by the work being stopped by plaintiff's notice. In the latter part of the contract quoted above there occurs the following provision: "It is further understood that in no case shall the well be sunk deeper than 500 feet deep at this price from the surface of the ground. It is the understanding that when the well is complete as above it shall be paid for as first mentioned, namely, one-half cash and the balance in note as above." This language the district court probably construed as a limitation with respect to the depth of the proposed well, for, although the well had actually reached the depth of 520 feet, the defendant's right to compensation was limited to 500 feet. This construction is not questioned by any party and is probably correct in the abstract. The stipulated 2,000 gallons of water per hour could not, therefore, be obtained by sinking the well deeper. It was seven inches in diameter for a distance of but 145 feet from the surface. Was there any showing that, by reaming out the well so that its diameter would have been for its entire depth seven inches there would have been even a probability of increasing the flow of water? Mr. Burns testified that the test showed but twelve or fifteen hundred gallons per hour of muddy water. On being recalled he further stated that he had pumped nearly five thousand gallons per hour from a two-inch well, repeatedly, and through a four-inch pipe had pumped seven or eight thousand gallons per hour. There was no pipe of less diameter than that last named in this well, so that we are bound to believe that for the distance of 520 feet there was no pipe which would not admit of a flow of seven or eight thousand gallons of water per hour, provided such an amount of water had been reached. The utmost amount found by the test of Mr. Burns did not exceed fifteen hundred gallons per hour, and, since the pipe which he used admitted of a flow of seven or eight thousand gallons per hour, a capacity in excess of

the water found of at least fifty-five hundred gallons, it conclusively results that at the depth of 500 feet, where this test was made, the well would not yield more than three-fourths of the amount of water stipulated for, irrespective of whether the pipe was of the diameter of four inches or seven inches. While by reaming out the well it was possible to comply with the accepted requirement that the pipe within it should be seven inches in diameter, the proofs are direct and convincing that another indispensable condition, and that, too, of the only value to the other contracting party, could not thereby be met. It is possible that this well might be sunk to the depth of 500 feet, that to this depth a seven-inch pipe could be inserted, and that the tubular well so sunk could be fully equipped for the sum of \$594.50 allowed for these purposes by the district court, but what would this avail if there was no water to hoist? It may be urged that there would be 1,500 gallons of muddy water available per hour, but this, as a compliance with the terms of the contract alleged to have been fully performed, would have been as unavailable as though no water whatever had been found. In this case there is no element of acceptance of benefits resulting from a partial compliance, neither is there any waiver of a literal performance of the terms of the written agreement. The contract of the defendant made his right to payment contingent upon a result which he has never accomplished. The district court, by the allowance of \$594.50 for the purpose of sinking and equipping a seven-inch tubular well, has attempted to place the parties in the same situation as though Mr. Burns had fulfilled his undertakings. This much alleged and proved would not have entitled him to recover as for the full performance of his contract. (*Sherman v. Bates*, 15 Neb., 18.) Indeed, this proposition is practically admitted by counsel for the appellee, since, in his brief, he quotes with approval the following language from 2 Sutherland, Damages, p. 508: "The action may be

brought on the contract when the contractor can show that he has substantially performed his part, except as he can allege and prove the legal excuse of being prevented by the employer, the act of God, or the law, but not otherwise;" citing *Smith v. Gugerty*, 4 Barb. [N. Y.], 614; *Estep v. Fenton*, 66 Ill., 467; *Taylor v. Beck*, 13 Ill., 376. The questions presented have been considered on this theory of the appellee, conformably with which his entire evidence was introduced.

Under the averments in the cross-petition of defendant of strict performance of the terms of his contract it more than admits of doubt whether in any event the relief decreed could have been granted, for proof of facts which excuse performance can never be said to amount to performance itself. A party will not be allowed to allege in his petition one cause of action and prove an other upon the trial. The *allegata et probata* must agree. (*Imhoff v. House*, 36 Neb., 28; *Powder River Live Stock Co. v. Lamb*, 38 Neb., 339; *Traver v. Shaeffe*, 33 Neb., 531; *Luce v. Foster*, 42 Neb., 818.) The cross-petition presented but the right to enforce a mechanic's lien for the full performance of a written contract. The decree recognized under these averments the right to show and recover for but a partial performance.

Appellant has strenuously contended that no right to enforce a mechanic's lien for the sinking of a well exists under the statutes of this state. Of this proposition no decision was necessary, hence it has received no consideration. In our investigations we have not questioned the right to relief of this character upon a proper case being presented, but this has been conceded solely for the purposes of this discussion. The judgment of the district court is

REVERSED.

SAMUEL MAXWELL ET AL. V. CARLOS C. BURR.

FILED FEBRUARY 19, 1895. No. 6437.

44	31
55	463
55	625
44	31
57	600

Evidence to Vary Terms of Contract of Guaranty.

Upon the faith thereof, goods were furnished to the party in whose favor there was executed by the defendant to plaintiffs this written guaranty: "In consideration that S. A. Maxwell & Co. furnish to M. Stoughton merchandise to the amount of \$762.32 on credit, I, for value received, hereby guaranty due payment thereof." In a suit to recover the purchase price of such goods, less in amount than above named, evidenced by notes of Stoughton, *held*, that it was not competent to vary the terms of said written guaranty by evidence that the credit contemplated thereby had been in advance, by agreement between plaintiffs and defendant, limited to a certain fixed period of duration.

ERROR from the district court of Lancaster county.
Tried below before HALL, J.

Ricketts & Wilson, for plaintiffs in error.

Pound & Burr, *contra*.

RYAN, C.

In this action brought by the plaintiffs in error in the district court of Lancaster county there was a judgment in favor of the defendant, except as to a small sum, in reference to which no discussion is necessary. The instrument sued on was in the following language:

"GUARANTY.

"In consideration that S. A. Maxwell & Co., of Chicago, Ills., furnish to M. Stoughton, Lincoln, Neb., mdse. to the amount of \$762.32 on credit, I, for value received, hereby guaranty due payment thereof. C. C. BURR."

In the petition it was alleged that plaintiffs, wholly relying upon said guaranty, sold and delivered to M. Stough-

ton goods and merchandise, as per statement attached to said petition, of the agreed price and value of \$762.32, as ordered by said Stoughton. The defendant in his answer admitted that goods and merchandise of the agreed price and value of \$762.32 were sold to Stoughton by the plaintiffs in reliance upon the guaranty set out in the petition, and that no part thereof had been paid. This admission, that no part of the purchase price of the goods purchased has been paid, serves to eliminate from consideration the suggestion that by giving his notes Stoughton paid the account in settlement of which said notes were given.

The district court found specially that about October 1, 1890, plaintiffs, through P. W. Meiksell, plaintiffs' agent, sold a bill of goods amounting to \$762.32 to M. Stoughton of Lincoln, Nebraska; that the terms of said sale were that the goods should be shipped from time to time, covered by a written order made between said parties until the full order had been supplied; that for the goods shipped prior to March 1, 1891, Stoughton was to settle at the latter date, by payment in cash at a certain rate of discount, or give his note for such amount as should be delivered before March 1, 1891, as of that date due four months thereafter, and for all goods shipped after March 1 aforesaid Stoughton was to pay cash with a discount off, or give his note due four months from the date of shipment; that before plaintiffs would ship any of the goods after the receipt of the above order they wrote to Stoughton that they must have a guaranty or the payment of the bill, whereupon Stoughton procured the guaranty sued on. The court found specially that after Stoughton sent in the guaranty plaintiffs began shipping goods under the aforesaid order, and before March 1, 1891, had shipped goods of the value of \$609.40; that after March 1, aforesaid, goods were shipped in installments, aggregating \$129.86; that there were executed to plaintiffs by Stoughton on March 2, 1891, four promissory notes for the sum of \$152.35 each, or in all, \$609.40,—the value of

the goods sold before March 1, aforesaid; that these notes fell due respectively in 1891 as follows: One on June 1, one on June 20, one on July 10, and finally one on August 1; and that the defendant was ignorant of the terms of the contract made October 1, 1890, between plaintiffs through Meiksell, their agent, and Stoughton, and was also without knowledge of the giving by Stoughton of his notes to plaintiffs.

On the above findings of fact the district court based its conclusions of law, that the contract of guaranty of the defendant should be construed and his liability thereunder determined by the terms of the sale made by Meiksell for plaintiffs to Stoughton, and that by taking notes as above described, instead of taking a single note for \$609.40, due July 1, 1891, plaintiffs changed the terms of the contract between themselves and Stoughton from what those terms were when the contract of guaranty was made, whereby the guarantor was relieved of his liability as such. It is not deemed necessary to discuss, separately, the transactions arising out of the sales made after March 1, 1891, for the measure of the defendant's liability applicable to the transactions of previous dates, equally governs these. As to the correctness of the abstract principle applied by the district court there seems to be little, if any, difference between counsel for the respective parties. If we understand them correctly, they agree that if the defendant, as a guarantor, became bound for the payment by Stoughton of a certain sum at a fixed time, an extension of the time of payment by the payee on a sufficient consideration, without the consent of the guarantor thereto, operated to release his collateral liability. As has already been remarked, the claim that the notes given operated as a payment is not presented in this record. The only questions are, first, whether or not there was, when the guaranty was executed, an existing contract of sale, and second, did any contract between plaintiffs and Stoughton inflexibly require that a

note or notes taken March 1, 1891, should fall due July 1 thereafter.

It has already been noted that in the petition it was averred that, relying wholly upon the guaranty and the faith and credit of the guarantor, plaintiffs sold and delivered to M. Stoughton the goods for the payment of which this suit was brought, and that in the answer there was an admission that said goods, of the agreed price and value sued for, were sold to Stoughton in reliance upon the guaranty. The evidence of Mr. Stoughton was without bearing on this point, and the usages of trade were not established by such proofs as would entitle them to consideration as having impliedly been within the minds of both contracting parties when the goods were sold, so that there was in reality only the testimony of Mr. Meiksell as to the manner in which the sale of the goods was made and its terms. Referring to the list of merchandise sold, which was thereupon introduced in evidence, Mr. Meiksell said:

"This is a list of goods that I sold him in two orders, Nos. 27 and 29; but you understand I took these in a manifold copy book and delivered to him a copy of the order. * * * On the one order—the copy of the order that he got—the statement was made on there that that was stock goods. The bill was to be four months from March next. * * * All goods were sold in the regular terms of all wall-paper houses, jobbers and manufacturers, four months from the first of March following the order. * *. The understanding was the bill would not be due until next July.

"Q. Now I notice this paragraph in the heading of the bill, 'Terms four months note or 12 per cent per annum discount for unexpired time. Settlement to be made within 30 days from date of invoice (either by note or cash).' Now what do we understand to be the custom under that clause?

"A. Well, it is the custom of all paper houses to require

notes of a man after he receives the goods simply to make a showing that he has got, or has had the goods, because, if we give a man four months' time and required no note he might get up and swear he never got the goods."

It has already been stated that for the introduction of testimony as to custom no sufficient foundation was laid. It is hardly necessary to point out that the above evidence as to the purpose for which notes were taken was incompetent as being in contradiction of the language of the notes themselves. The question and answer quoted are fully set out as a striking illustration of the violation in practice of the rule that parol evidence is inadmissible for the purpose of varying the terms of a written contract. Without doubt, counsel for defendant in error will concede the correctness of this rule and that it is, in this instance, very applicable. Let us now consider the language of the written guaranty, and the parol evidence offered in connection therewith, in the light of the same rule. Its language was as follows: "In consideration that S. A. Maxwell & Co., of Chicago, Ills., furnish to M. Stoughton, Lincoln, Neb., mdse. to the amount of \$762.32 on credit, I, for value received, hereby guaranty the payment thereof." In this there is contained no reference to a credit already contracted for, or one of any particular kind or duration. By the above quoted testimony of Mr. Meiksell it was attempted to be shown that when the guaranty was executed an oral contract between plaintiffs and Stoughton was already in existence, by the terms of which inflexibly there had been fixed a credit of four months to be extended to Stoughton dating from March 1, 1891. Why was this evidence admissible if that offered as to the purpose for which Stoughton's notes were given was incompetent? The evidence of Mr. Meiksell tended only to show that an order for goods had been made out by him of which a copy was at that time given to Stoughton. This order was evidently prepared from oral suggestions, perhaps made by Stoughton,

or advanced by Meiksell and assented to by Stoughton. In so far as the plaintiffs are concerned this order was, therefore, but the oral propositions of Stoughton made to plaintiffs' agent and by that agent communicated to his principal. As alleged in the petition, and admitted by the answer, this order was filled on the faith of the guaranty, which, without question, was executed after the order of Stoughton had been given to Meiksell. To demonstrate that evidence of any kind was inadmissible for the purpose of engrafting new conditions upon the written guaranty, as well as with the view of illustrating the applicability of this rule to the facts of this case, and for what purposes alone oral evidence might be receivable, reference is made to *Tootle v. Elgutter*, 14 Neb., 158. The question presented in the case just cited was whether or not a guaranty sued upon had been exhausted by the first credit to the amount therein named, or was one continuing in its nature. While it is not an authority in point as an adjudication, it contains language so appropriate to our above enumerated purposes that, without comment, it is quoted and adopted as part of this opinion.

"The rule is well settled that where a contract has been reduced to writing, without any uncertainty as to the object and extent of the obligation, the presumption is that the entire contract was reduced to writing, and oral testimony as to declarations at the time it was made are not permitted, except in a direct proceeding for that purpose to change the written instrument. In other words, parol contemporaneous evidence is not admissible to change the terms of a valid written contract. (1 Greenleaf, Evidence, sec. 275.) But this restriction applies only to the language of the contract. It may be read by the light of surrounding circumstances—by the construction given to it by the parties themselves, in order more perfectly to understand the intention of the parties. In such cases the court is not to inquire what the parties may have secretly intended, but what is

the meaning of the words they have used. (1 Greenleaf, Evidence, sec. 277.)

"As is said by a late writer, the general rule that unambiguous language in a contract must control, does not exclude extrinsic evidence of the subject-matter and other surrounding circumstances to enable the court to consider what the parties saw and knew in order to ascertain their meaning. (Abbott, Trial Evidence, 508.)

"In *Hargreave v. Smee*, 6 Bing. [Eng.], 244, Chief Justice Tindal said: 'The question is, what is the fair import to be collected from the language used in this guaranty? The words employed are the words of the defendant and there is no reason for putting on a guaranty a construction different from that which the court puts upon any other instrument. With regard to other instruments the rule is, that if the party executing them leave anything ambiguous in his expressions such ambiguity must be taken most strongly against himself.'

"In *Mason v. Pritchard*, 12 East [Eng.], 227, it is said: 'The words were to be taken as strongly against the party giving the guaranty as the sense of them would admit.' "

The language above quoted establishes the propositions that evidence was admissible of the circumstances surrounding the making of the guaranty to enable the court more perfectly to understand the intention of the parties, but not to prove what they secretly intended, nor for the purpose of varying or contradicting the terms of the guaranty itself. The evidence upon which was predicated the finding that when the guaranty was made there existed a contract which required that such notes of Stoughton as should be taken should be for the exact time of four months was insufficient to sustain said finding, and besides was wholly incompetent. The conclusion deduced, that the taking of the notes for periods other than that above indicated relieved the defendant of liability, was, therefore, without warrant. As the discharge of the guarantor wholly de-

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pended upon the finding of fact and conclusion of law just referred to, the judgment in the defendant's favor is reversed and this cause is remanded for further proceedings not inconsistent with the views herein expressed.

REVERSED AND REMANDED.

44	38
49	150
54	577
55	29
55	366

JAMES RICHARDS, APPELLEE, AND GROMMES & ULLRICH
ET AL., APPELLANTS, V. GILBERT I. LEVEILLE ET
AL., APPELLEES.

FILED FEBRUARY 19, 1895. No. 5949.

1. **Partnership: INSOLVENCY: DISTRIBUTION OF ASSETS.** Where a copartnership is insolvent a court of equity, when its powers are invoked to that end in a proper proceeding, either by a member of such copartnership or by a firm creditor, will apply the assets of the copartnership to the payment of the firm debts to the exclusion of the debts of the individual partners. (*Roop v. Herron*, 15 Neb., 73; *Caldwell v. Bloomington Mfg. Co.*, 17 Neb., 489; *Rothell v. Grimes*, 22 Neb., 526; *Banks v. Steele*, 27 Neb., 138; *Tolerton v. McLain*, 35 Neb., 725.)
2. ———: ———: ———. Such rule is based on the legal presumption that the creditors of a copartnership have given credit to it on the faith of the firm assets and business, while the debts of the individual members of the firm were contracted on the faith and credit of the individual responsibility and property of the members.
3. ———. A partnership is a distinct entity, having its own property, debts, and credits. For the purposes for which it was created it is a person, and as such is recognized by law. (*Roop v. Herron*, 15 Neb., 73.)
4. ———: **SALE OF ASSETS.** A copartnership may sell, convey, incur, and dispose of its property in the same manner that an individual may; and the copartnership assets may be levied upon and sold for the payment of the debts of all the individual members of the copartnership, and such sale will not be invalid because the debt was that of the individual members of the firm.

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5. ———: **PREFERRING CREDITORS.** A copartnership, even though insolvent, has the right to pay a part of its creditors in full to the exclusion of others, so long as such payment is made with an honest purpose. (*Deitrich v. Hutchinson*, 20 Neb., 52.)
6. ———: **LIEN OF CREDITORS UPON ASSETS.** The creditors of a copartnership, merely because they are creditors, are not given a lien by law upon its assets, whether the firm be solvent or insolvent.
7. ———: **ASSETS: TRUSTS.** The assets of a copartnership, even though it be insolvent, are not held in trust by the members of the firm for the payment of copartnership debts.
8. ———: **EQUITY: DISTRIBUTION OF ASSETS.** It is only in a proper proceeding instituted by a member of an insolvent copartnership or by a creditor thereof that the assets of such copartnership are first applied by a court of equity to the payment of copartnership debts.
9. ———: ———: ———. And such application is not thus made because the copartnership assets are trust funds for the payment of firm creditors, nor because creditors of an insolvent copartnership are by law given a lien on such assets to secure the payment of their debts; but such application is based upon the equitable doctrine that that fund, on the faith of the existence of which a credit was given, should be first applied to the liquidation of such credit.

APPEAL from the district court of Douglas county.
Heard below before IRVINE, J.

The facts are stated by the commissioner.

Albert S. Ritchie, for appellants:

If the debt for which the note was given was a partnership debt, then there is no equity in the claim that the execution was not a lien upon the partnership property, because it would only be levying upon property belonging to the partnership for a firm debt, and this could be done whether the execution ran against them individually or as a partnership. (*Martin v. Davis*, 21 Ia., 335.)

Even if the note was the individual debt of the partners, the execution, levied as it was, became a lien upon the

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partnership property. (*Saunders v. Reilly*, 105 N. Y. Ct. App., 12; *Ransom v. Van Derenter*, 41 Barb. [N. Y.], 307; *Wilson v. Robertson*, 21 N. Y., 587; *Kirby v. Schoonmaker*, 3 Barb. Ch. [N. Y.], 46; *Case v. Beauregard*, 99 U. S., 119; *Fitzpatrick v. Flannagan*, 106 U. S., 648; *National Bank of the Metropolis v. Sprague*, 20 N. J. Eq., 30.)

Kennedy & Learned, contra:

Where a partnership is insolvent, the creditors of the firm have the primary claim on the partnership property, and the partnership debts are to be paid before any portion of such funds can be applied to other purposes. (*Banks v. Steele*, 27 Neb., 138; *Rothell v. Grimes*, 22 Neb., 526; *Caldwell v. Bloomington Mfg. Co.*, 17 Neb., 489.)

RAGAN, C.

James Richards and Gilbert I. Leveille constituted a copartnership under the firm name of Richards & Co., domiciled in Douglas county, Nebraska, and engaged in the business of contracting and building. On the 12th of June, 1891, in the county court of said Douglas county, Grommes & Ullrich, a copartnership domiciled in Chicago, Illinois, and dealing in liquors and cigars, recovered a judgment against said James Richards and Gilbert I. Leveille for the sum of \$338.70, on a promissory note theretofore executed by said James Richards and Gilbert I. Leveille to the said Grommes & Ullrich. On the 8th of July, 1891, an execution was issued on this judgment and delivered to a constable, who seized certain of the copartnership property of Richards & Co. thereunder. On the 9th of July, 1891, said James Richards brought a suit in equity in the district court of Douglas county against his copartner Leveille. In his petition Richards alleged the existence of the copartnership between himself and Leveille, the insolvency of said copartnership, and that the judg-

ment of Grommes & Ullrich was not a debt of the copartnership of Richards & Co., but was based on the individual debt of his copartner, Leveille, to Grommes & Ullrich for liquors and cigars purchased by Leveille from Grommes & Ullrich for the former's benefit. Richards prayed for a dissolution of the copartnership and for the appointment of a receiver to take charge of the assets of the firm of Richards & Co. A receiver was accordingly appointed, and said constable, in obedience to an order of the court, turned over the property of the copartnership of Richards & Co. which he had seized on the execution in favor of Grommes & Ullrich to said receiver. Grommes & Ullrich and the constable, by permission of the court, then filed a petition of intervention in the action of Richards against Leveille, claiming a lien upon the property levied upon by the constable by virtue of such levy. The district court found and decreed that the intervenors had no lien upon said property seized by the constable, and ordered the receiver to hold and apply the proceeds of the sale of the property in accordance with the further order of the court, and from this decree Grommes & Ullrich and Dingman, the constable, have appealed.

The only issue of fact presented to the district court was whether the judgment of Grommes & Ullrich against James Richards and Gilbert I. Leveille was founded on a debt of the copartnership of Richards & Co., or the debt of the individual members of such copartnership; and from the order made by the district court it must have found on this issue that the judgment was not based upon the debt of the copartnership; and the evidence justifies this finding. Here then we have an insolvent copartnership, the assets of which have been seized on execution for the satisfaction of the individual debt of the members, or one of them, of the firm, and one of the members of such copartnership appealing to a court of equity for a decree directing that the firm debts should be paid out of

the assets of such copartnership before such assets should be used to discharge individual debts of the members of such firm. The rule is that where a copartnership is insolvent a court of equity, when its powers are invoked to that end in a proper proceeding, either by a member of such copartnership or by a copartnership creditor, will apply the assets of the copartnership to the payment of the firm debts to the exclusion of the debts of the individual partners. (*Till's Case*, 3 Neb., 261; *Roop v. Herron*, 15 Neb., 73; *Caldwell v. Bloomington Mfg. Co.*, 17 Neb., 489; *Rothell v. Grimes*, 22 Neb., 526; *Banks v. Steele*, 27 Neb., 138; *Tolerton v. McLain*, 35 Neb., 725.) This rule is based on the legal presumption that the creditors of a copartnership have given credit to the firm on the faith of the copartnership assets and business, while the debts of the individual members thereof were contracted on the faith and credit of the individual responsibility and property of the members; and when the affairs of an insolvent copartnership come to be settled by a court of equity it will apply the assets in accordance with such legal presumptions. *Saunders v. Reilly*, 12 N. E. Rep. [N. Y.], 170, relied upon by counsel for appellants, is not opposed to this rule. In that case a sheriff levied an execution issued on a judgment against the individual members of an insolvent copartnership upon the entire firm assets and sold them. Subsequently a creditor of such copartnership obtained a judgment against it and put an execution in the hands of the sheriff, which he returned unsatisfied. The copartnership judgment creditor then sued the sheriff for making a false return, and the court held that the sheriff was not liable, as the copartnership assets could be levied upon and sold under an execution against all the members thereof for their individual debts. In the case at bar, if the firm creditors of Richards & Co. and the members of such firm had remained inactive and permitted the constable, Dingman, to sell the copartnership assets levied upon, such sale would

not have been invalid, because the copartnership assets were sold to satisfy the individual debts of the copartners. A partnership is a distinct entity, having its own property, debts, and credits. For the purposes for which it was created it is a person, and as such is recognized by the law. (*Roop v. Herron*, 15 Neb., 73.) And a copartnership, even though in failing circumstances, has the right to pay a part of its creditors in full to the exclusion of others, so long as such payments are made with an honest purpose. (*Dietrich v. Hutchinson*, 20 Neb., 52.) The creditors of a copartnership, merely because they are creditors, are not given a lien by law upon its assets whether the firm be solvent or insolvent. If they were, it would be impossible for the copartnership to transact business, as every person who purchased any part of its property would take the property purchased subject to such liens. Nor are the assets of a copartnership, even though insolvent, held in trust by the members of the copartnership for the payment of firm debts. A copartnership may sell, convey, incumber, and dispose of its property in the same manner that an individual may; and the copartnership assets may be levied upon and sold for the payment of the debts of the copartnership, or for the payment of the debts of all the individual members of the copartnership, in the same manner as can the assets of an individual. It is only when in a proper proceeding instituted by a member of the insolvent copartnership or by a creditor thereof that a court of equity interferes and applies the copartnership assets first to the payment of the copartnership debts; and such application is not thus made because the copartnership assets are trust funds for the payment of copartnership creditors, nor because creditors of an insolvent copartnership are by law given a lien thereon to secure the payment of their debts, but such application is based upon the equitable doctrine that that fund, on the faith of the existence of which a credit was given, should

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be applied in equity to the liquidation of such credit. The decree appealed from is in harmony with these views and it is accordingly

AFFIRMED.

IRVINE, C., not sitting.

CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY V. JOSEPH BELL.

FILED FEBRUARY 19, 1895. No. 5449.

1. **Corporations: RAILROAD COMPANIES: PARTICIPATION IN RELIEF DEPARTMENT: ULTRA VIRES: PRESUMPTION.** The scheme of the Burlington Relief Department, organized and conducted by the Chicago, Burlington & Quincy Railroad Company and its employes, examined and set out in the opinion, and *held*, (1) as said railroad company is a corporation and no part of its charter is set out in the pleadings or evidence in the record, the court is unable to determine whether the act of the railroad company in participating in the organization and conduct of the Relief Department is within or without the express or implied powers conferred by its charter; (2) in the absence of all evidence on the subject, the court cannot presume such act of the railroad company is *ultra vires*.
2. **Contracts with Relief Department of Railroad Company: CONSIDERATION: CONSTRUCTION: PUBLIC POLICY: ESTOPPEL.** The contract signed by an employe of said railroad company on becoming a member of said Relief Department, to the effect that if he should be injured and receive moneys from the relief fund of said Relief Department on account thereof, that the acceptance of such relief fund should operate as a release of such employe's claim against said railroad company for damages because of such injury, construed, and *held*, (1) that such contract of an employe did not lack consideration to support it; (2) that the promise made by the employe to the relief department for the benefit of the railroad company was available to the latter as a cause of action or defense; (3) that such contract was not contrary to public policy; (4) that the effect of such con-

44	44
50	461
50	520
151	448
51	463

44	44
80	692
180	698

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tract was not to enable the railroad company to exonerate itself by contract from liability for the negligence of itself or servants; (5) that the employe did not waive his right of action against the railroad company, in case he should be injured by its negligence, by the execution of the contract; (6) that it is not the execution of the contract that estops the injured employe, but his acceptance of moneys from the Relief Department on account of his injury after his cause of action against the railroad on account thereof arises.

3. Release and Discharge: ACCEPTANCE OF MONEY FROM RELIEF DEPARTMENT: RIGHT OF EMPLOYE TO RECOVER FOR NEGLIGENCE OF RAILROAD COMPANY. An employe of said railroad company and a member of said Relief Department was injured through the negligence of the railroad company. After his injury there was paid to him from the funds of the Relief Department \$60 on account of such injury. The employe accepted this money and then sued the railroad company for damages for negligently injuring him. There was no showing that such employe was induced to become a member of said Relief Department, or execute said contract of release, or accept the money paid to him by said Relief Department, through fraud or mistake. *Held*, That the employe could not recover.

ERROR from the district court of Lancaster county.
Tried below before TIBBETS, J.

T. M. Marquett and J. W. Deweese, for plaintiff in error, cited: *Graft v. Baltimore & O. R. Co.*, 8 Atl. Rep. [Pa.], 206; *Spitze v. Baltimore & O. R. Co.*, 23 Atl. Rep. [Md.], 308; *Owens v. Baltimore & O. R. Co.*, 35 Fed. Rep., 718; *State v. Baltimore & O. R. Co.*, 36 Fed. Rep., 655; *Fuller v. Baltimore & Ohio Employes' Relief Association*, 67 Md., 433; *Kinney v. Baltimore & Ohio Employes' Relief Association*, 53 Am. & Eng. R. Cas. [W. Va.], 34; *Johnson v. Philadelphia & R. R. Co.*, 29 Atl. Rep. [Pa.], 854; *Ringle v. Pennsylvania R. Co.*, 30 Atl. Rep. [Pa.], 492.

Sawyer & Snell, contra, cited: *Miller v. Chicago, B. & Q. R. Co.*, 65 Fed. Rep., 305.

Capps & Stevens, also for defendant in error, cited: *Atchi-*

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son, T. & S. F. R. Co. v. Lawler, 40 Neb., 356; *Reynolds v. Nichols*, 12 Ia., 398; *Ray v. Mackin*, 100 Ill., 246; *Lake Shore & M. S. R. Co. v. Spangler*, 44 O. St., 471; *Western & A. R. Co. v. Bishop*, 50 Ga., 465; *Cook v. Western & A. R. Co.*, 72 Ga., 48; *Pickering v. Ilfracombe R. Co.*, L. R., 3 C. P. [Eng.], 250; *United States v. Bradley*, 10 Pet. [U. S.], 343; *Hynds v. Hays*, 25 Ind., 31; *State v. Findley*, 10 O., 51; *Roesner v. Hermann*, 10 Biss. [U. S.], 486; *Kansas P. R. Co. v. Peavey*, 29 Kan., 169; *O'Neil v. Lake Superior Iron Co.*, 63 Mich., 690; *Russell v. Richmond & D. R. Co.*, 47 Fed. Rep., 204; *Omaha Street R. Co. v. Loehneisen*, 40 Neb., 37.

RAGAN, C.

Joseph Bell sued the Chicago, Burlington & Quincy Railroad Company (hereinafter called the "Railroad Company") in the district court of Lancaster county for damages. As a cause of action he alleged that on the 13th of December, 1890, he was a switchman in the employ of the Railroad Company at New Castle, in the state of Wyoming; that as such switchman it was his duty to couple freight and passenger cars with the locomotive engines of the Railroad Company, and in order to do so to step inside the rails and between the engine and the car to which it was to be coupled; that it had been the custom and it was the duty of the Railroad Company to furnish for switching purposes a switching engine so constructed as to enable a switchman to safely pass between such engine and the car to which it was to be attached; that on the date aforesaid the switch engine of the Railroad Company at New Castle was disabled; that there was in the yard at New Castle at that time belonging to the Railroad Company an ordinary road engine used between the towns of New Castle and Cambria for the purpose of hauling heavy freight trains over the grades between said towns; that said road engine had attached to the rear end of its tender two large sand boxes

which extended out to the rear of the tender a distance of some twelve or eighteen inches; that by reason of said sand boxes being attached thereto said road engine was wholly unsafe for switching purposes and especially for switching of passenger coaches, all of which was unknown to Bell; that on said date the yard-master of the Railroad Company, whose orders Bell was obliged to obey, directed him, Bell, to couple a passenger coach on said road engine; that to obey said order it was necessary for Bell to go inside the rails between said coach and said road engine; that Bell, without any negligence on his part, went between said coach and road engine for the purpose of coupling the two together, and while in the act of making such coupling the coach and road engine were pushed together and he was crushed between the coach and one of the sand boxes attached to said engine, and injured.

Among other defenses the Railroad Company pleaded: "Further answering the said petition, the defendant says that prior to the time of this accident, the defendant and its employes organized an association for the relief of employes of said company injured while in the service of the said defendant, known as the Burlington Voluntary Relief Department; that said association thus formed was a department for the protection and relief of employes injured in the service of the said company, providing for the payment of certain sums of money for injuries received in the service of said company, and for maintenance and support under certain specifications and terms and conditions, as provided for in the organization and rules of the said Burlington Voluntary Relief Department; that at and prior to the time of said injury the plaintiff was a member of said association, and when injured, and subsequent thereto on account of being such member, the said plaintiff received and accepted the benefits due to him by reason of his membership in said Relief Department, and the defendant company paid to the plaintiff the amount of the

benefits due to him by reason of his membership in said Relief Department on account of said injury, and the plaintiff received and receipted for the said amounts of money thus paid to the plaintiff as benefits accruing to him by reason of said injury on account of his membership in said association, and in consideration therefor duly released the defendant from any and all liability on account of the said accident, other than the benefits accruing to him by reason of his membership in said Burlington Voluntary Relief Department. The defendant furthermore alleges that it is discharged and released from any and all liability that might exist in favor of the plaintiff on account of the said injury, and the plaintiff is barred and estopped from claiming any damages from this defendant by reason of his membership in the said Relief Department and the acceptance by him of the benefits thereof paid as hereinbefore stated."

Bell replied to this defense as follows: "And plaintiff further replying admits that prior to the time of the accident complained of there had been created an organization known as the Burlington Voluntary Relief Department, and that he had become a member of said organization by paying the usual initiation fee, and ever thereafter maintained his membership therein by paying all regular dues and charges imposed upon him by said association, and that by reason of his membership and continued good standing in said association he did by the terms thereof become and was, upon the happening of the injury complained of, entitled to certain benefits, amounting to the sum of \$60, which he received at the hands of said association, but plaintiff says that said benefits so received were not, nor was it ever intended or contemplated that they should be, in settlement or compensation of the injuries most wrongfully and negligently inflicted upon him by defendant. And further replying plaintiff expressly denies that said dues were paid him as a contribution for his releasing de-

fendant from its liability for its wrongs and injuries to him, or that he ever in any way executed to defendant a release for the injury complained of."

Bell had a verdict and judgment and the Railroad Company brings the case here on error.

It appears from the evidence in the record that the Burlington Voluntary Relief Department, mentioned in the answer of the Railroad Company quoted above, and hereinafter called the "Relief Department," is a department of the Railroad Company's service. The object in establishing the Relief Department is declared to be "the establishment and management of a fund to be known as the relief fund, for the payment of definite amounts to employes contributing thereto who are to be known as members of the relief fund, when under the regulations they are entitled to such payment by reason of accident or sickness, or in the event of their death, to the relatives or other beneficiaries designated by them." The relief fund consists of voluntary contributions from employes of the Railroad Company, income derived from investments, and interest paid and appropriations made by the Railroad Company. The Railroad Company has general charge of the Relief Department, guaranties the fulfillment of its obligations, takes charge of all moneys belonging to the relief fund, makes itself responsible for the safe keeping of such moneys, and pays to the Relief Department interest at the rate of four per cent per annum on monthly balances in its hands, supplies the necessary facilities for conducting the business of the Relief Department, and pays all the operating expenses thereof. There is also an advisory committee, which has general supervision of the operations of the Relief Department. This committee is composed of five members of the board of directors of the Railroad Company, and the contributing employes on each division of the Railroad Company furnish one member of the committee, and the general manager of the Railroad Company is *ex-officio* a member

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and chairman of such committee. The moneys received for the relief fund are held by the company in trust for the Relief Department, and any money not required for immediate use is invested under direction of the advisory committee. All employes of the Railroad Company who are contributors to the relief fund are designated as members of the relief fund. No employe of the Railroad Company is required to become a member of the Relief Department. All employes of the Railroad Company who volunteer to and do become members of the Relief Department are divided into classes according to the monthly wages received. Those receiving the highest wages per month make the highest contribution to the Relief Department. Each member contributes monthly a specified sum according to the wages received. All employes of the Railroad Company who pass a satisfactory medical examination and are possessed of good moral characters are eligible for membership in the Relief Department. If a contributing member is under disability, that is, if he is unable to work, whether such disability arises from an injury received while at work or arises from sickness, he is entitled to be paid from the relief fund a certain sum per day. This amount varies according to the wages which the employe is receiving at the time his disability occurs. And in case of the death of the employe the beneficiary designated by him is entitled to be paid a specified sum according to the class of employes to which the deceased belonged. The employes of the Railroad Company, in order to become members of the Relief Department, make an application to it in writing, and in this application among other things they agree: "I also agree that in consideration of the amounts paid and to be paid by said [Railroad] Company for the maintenance of the Relief Department, the acceptance of benefits from said relief fund for injury or death, shall operate as a release and satisfaction of all claims for damages against said company arising from such injury or death which could be made by me or my legal representatives."

The evidence shows that this Relief Department was organized on the 1st day of June, 1889, and from that day to the 31st of December, 1891, the employes of the Railroad Company had paid into the Relief Department or relief fund \$359,639.96; that the Railroad Company in the time aforesaid had paid to the relief fund, interest on the monthly balances of its money, \$1,040.34; that there had been paid during said time to members of the Relief Department on account of sickness and death from sickness \$187,885.50; during said time there had been paid to members of the Relief Department on account of accidents and deaths from accidents \$193,070.35; that the Railroad Company during said time had paid the entire expenses of the Relief Department; that no part of the relief fund moneys paid in by the employes had been used for defraying the expenses of the Relief Department; that from the organization of the Relief Department to December 31, 1891, the Railroad Company had paid out of its treasury for expenses of the Relief Department, for interest on monthly balances, and to make up deficiencies under its guaranty, \$114,012.08. The undisputed evidence in the record is that Bell was an employe of the Railroad Company; that on the 27th day of October, 1890, he applied to the Relief Department for membership therein, such membership to take effect on the 18th of said month; that his application was approved and he became a member of the Relief Department on November 10, 1890; that he was a member in good standing in said Relief Department at the time he was injured; that he was paid during the time he was disabled by said injury the following sums:

December 15 to 31, 1890, 17 days.....	\$17 00
January 1 to 31, 1891, 31 days.....	31 00
February 1 to 11, 1891, 11 days.....	11 00

Or a total of..... \$59 00

That these payments were made to Bell and received by

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him in accordance with the rules and regulations of the Relief Department, of which he was a member, and were paid to him on account of the injury for which he brings this action. Bell does not deny that he voluntarily became a member of the Relief Department; that he signed the application containing the agreement on his part that in case he was injured while in the employ of the company and accepted benefits from the relief fund on account thereof, that the acceptance of such benefits should be in settlement and discharge of the Railroad Company's liability to him for such injury; nor does he deny that during the time he was disabled from the injury sued for there was paid to him from the relief fund of the Relief Department on account of such injury the sums of money above stated, and that he accepted said money. It is not argued here, nor attempted to be shown either by pleading or evidence, that Bell did not voluntarily become a member of the Relief Department; nor that he did not execute the contract in question with full knowledge of its terms and effects. Nor is it claimed that he was induced to become a member of the Relief Department or to accept benefits paid him during his disability by any fraud, coercion, or mistake.

Counsel, for the purpose of overthrowing this defense, argue: (1) That Bell's agreement, that his acceptance of the benefits from the relief fund on account of his injury should operate as a release of his claim for damages against the Railroad Company for such injury, is without consideration; (2) that the act of the Railroad Company in participating in the organization of the Relief Department and conducting it is *ultra vires*; (3) that to enforce Bell's contract or release would be contrary to public policy.

If the contract of Bell is without consideration it must be because he received no consideration for the contract, or that the Railroad Company parted with no consideration by reason thereof. By reason of Bell's membership in the Relief Department, if he was disabled by sickness he be-

came entitled to certain sums of money out of the relief fund; if he was injured and thus disabled he became entitled to certain sums of money out of the relief fund; and if he died from any cause while in the service of the company and a member of the Relief Department, it became liable to a beneficiary designated by him for a specific sum of money. Here, then, was a consideration moving to Bell for the contract and promises he made and the contributions made by him to the Relief Department. The Railroad Company's guaranty of the obligations of the Relief Department and its assumption of the expenses of conducting the Relief Department constitute a consideration moving from it sufficient to support the promises of Bell and every other member of the Relief Department. (*Homan v. Steele*, 18 Neb., 652; *Pryor v. Hunter*, 31 Neb., 678.) If Bell had not been a member of the Relief Department, and after he had received the injury sued for herein had accepted from the Railroad Company the amount of money which he received from the Relief Department, or other sum of money, by virtue of his promise that the payment and acceptance of such money should be in settlement and discharge of his claims against the Railroad Company for damages for his injury, can it be doubted that the payment to and acceptance by Bell of such money, in the absence of fraud or mistake, would bar this action? The fact that Bell contracted and promised the Relief Department that if it paid him the money it did from its relief fund and he accepted such payments that then such payment and acceptance should be in settlement and discharge of the Railroad Company's liability for the injury, does not change the principle. "Where one makes a promise to another for the benefit of a third person, such third person can maintain an action upon the promise, though the consideration does not move directly from him." (*Shamp v. Meyer* 20 Neb., 223.)

The *ultra vires* argument.—For an act of a corporation

to be *ultra vires* such act must be beyond the express and implied powers given such corporation by its charter. The Railroad Company is a corporation. Bell in his replication to the defense under consideration has not set out the Railroad Company's charter, nor any part of it; nor is there any evidence in the record on the subject. We are therefore unable to say whether the act of the Railroad Company in participating in the organization and conduct of this Relief Department is within or without its express and implied powers as fixed by its charter. We certainly cannot presume, in the absence of all pleading and evidence, that the part taken by this Railroad Company in the organization and conduct of the Relief Department—confessedly organized from amongst its own employes and for their benefit—is a power neither granted nor permitted by its charter.

Should this release of Bell's be held void as against public policy? A contract or release similar to the one under consideration was considered and held not to be void as against public policy in *Johnson v. Philadelphia & R. R. Co.*, 29 Atl. Rep. [Pa.], 854. (*Owens v. Baltimore & O. R. Co.*, 35 Fed. Rep., 715; *State v. Baltimore & O. R. Co.*, 36 Fed. Rep., 655.) The argument at the bar is that the effect of Bell's release is to enable the Railroad Company by contract to exonerate itself from liability for the negligence of itself and servants. This is not a fair construction of the contract. Nothing in the rules and regulations of the Relief Department, nor in Bell's contract or release, released or attempted to release the Railroad Company from liability to Bell for negligently injuring him because he was a member of the Relief Department, contributed thereto, and such Relief Department had funds which Bell was entitled to have paid to him on account of his membership and injury. If the rules and regulations of the Relief Department or the terms of Bell's contract were such that his membership in the Relief Department, and its possession

of funds of which Bell had a right to avail himself, of themselves released or attempted to release the Railroad Company from liability to Bell for injuring him, then we agree with counsel that such rules and regulations and contracts would be void as against public policy. Again, if the rules and regulations of the Relief Department compelled him in case of his injury by the Railroad Company to accept the benefits and funds of the Relief Department in release and discharge of the Railroad Company's liability to him for such injury, then such rules and regulations and contract would be void as against public policy. But nothing in the rules and regulations of the Relief Department, and nothing in Bell's contract or release, obligates or compels him in case he is injured by the Railroad Company to accept the funds of the Relief Department in release and discharge of any claim he may have against the Railroad Company for injuring him, nor makes the funds themselves—though Bell is entitled to them and refuses to accept them—a release of the Railroad Company's liability. As was held in *Chicago, B. & Q. R. Co. v. Wymore*, 40 Neb., 645, neither the employe's membership in the Relief Department nor his execution of the contract under consideration was a waiver of the employe's right of action against the Railroad Company for injuring him. In that case Wymore was a member of the Relief Department, and was killed through the negligence of the Railroad Company. After his death his widow accepted from the funds of the Relief Department the death benefit to which she was entitled by virtue of being Wymore's widow and his membership in the Relief Department. She then brought a suit as administratrix against the Railroad Company for damages for negligently killing her husband. This suit was brought under chapter 21 of the Compiled Statutes, 1893; and we held that the right of action conferred by the statute was for the benefit of the widow and next of kin of the deceased who had lost his life through the neg-

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ligence of the railroad company, and that the acceptance by the widow of the death benefit from the funds of the Relief Department was a release and discharge of her cause of action against the Railroad Company given by that statute for her own benefit; but that neither Wymore's membership in the Relief Department, nor his contract with it, nor the acceptance of the death benefit by the widow, operated to bar or release her cause of action as administratrix against the Railroad Company in favor of Wymore's children. We adhere to that case. After Bell was injured he had the option to decline payment from the relief fund by reason of his injury, and rely upon his cause of action against the Railroad Company, and take as compensation for such injury what a jury might award him. The acts of Bell in becoming a member of the Relief Department and executing the contract under consideration did not and do not bar his right of action against the Railroad Company for negligently injuring him. In other words, by becoming a member of the Relief Department and by executing the release in question he did not waive nor bar any cause of action which might thereafter arise in his favor against the Railroad Company by reason of being injured or killed through the negligence of the Railroad Company or its employes. It was his action in accepting payments from the relief fund after he was injured and after his cause of action arose against the Railroad Company that now estops him. Notwithstanding his agreement and his membership in the Relief Department, whatever right of action he had against the Railroad Company for the injury he received remained unaffected by such membership and agreement; but after his injury, after his cause of action arose, he made his choice between the benefits which he could and did receive from the Relief Department and what he might obtain by litigation, and, so far as this record shows, he made such choice knowingly, deliberately, and without fraud, coercion, or mistake, and

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he must be bound thereby. (*Leas v. Pennsylvania R. Co.*, 37 N. E. Rep. [Ind.], 423.) The expression "contrary to public policy" we suppose means good public policy. This phrase has no fixed legal significance. It varies and must vary with the changing conditions and laws of civilizations and peoples. But we have been unable to discover anything in the contract made the subject of defense to this action unconscionable, contrary to law, or subversive of morals or good government. The judgment of the district court is contrary to the law and the evidence of the case and is reversed and the cause remanded.

REVERSED AND REMANDED.

EMMA L. VAN ETTEN V. DELL R. EDWARDS.

FILED FEBRUARY 19, 1895. No. 5867.

Review: EVIDENCE: FAILURE TO RELEASE MORTGAGE. There is no question of law involved in this case. The evidence examined, and *held* to support the finding of the jury, and the judgment is affirmed.

ERROR from the district court of Douglas county. Tried below before DAVIS, J.

David Van Etten, for plaintiff in error.

Breck & McClanahan, contra.

RAGAN, C.

Emma L. Van Etten sued Dell R. Edwards in the district court of Douglas county for damages for the latter's failure to release and discharge of record three certain chattel mortgages. Mrs. Van Etten alleged that she had executed

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and delivered these mortgages to Mrs. Edwards; that she had fully performed all the conditions of the mortgages, and that Mrs. Edwards had refused and neglected for the space of ten days to discharge the same of record after being duly requested so to do. Mrs. Edwards had a verdict and judgment, and Mrs. Van Etten has prosecuted to this court a petition in error.

The only point made in the motion for a new trial, and the only assignment of error here, is that the verdict is not supported by sufficient evidence. It would subserve no useful purpose to quote this evidence or any of it. We have carefully studied it, and we cannot agree with counsel for the plaintiff in error that the verdict rendered lacks evidence to support it. The judgment must be and is accordingly

AFFIRMED.

IRVINE, C., not sitting.

JOHN FLANNAGAN V. ROYAL C. CLEVELAND.

FILED FEBRUARY 19, 1895. No. 5874.

1. **Appeal Bonds: RECITALS: ESTOPPEL.** The signers of an undertaking in appeal are estopped in a suit upon such undertaking from making the defense that no appeal was in fact perfected. *Gudtner v. Kilpatrick*, 14 Neb., 347; *Adams v. Thompson*, 18 Neb., 541; *Duntermann v. Storey*, 40 Neb., 447, reaffirmed.
2. **Damages: ACTION ON APPEAL BOND: FAILURE TO PERFECT APPEAL.** An undertaking in appeal provided that the defendant in the judgment "would prosecute his appeal to effect and without unnecessary delay," and that if judgment should be adjudged against him on appeal the signers of the undertaking would satisfy such judgment and costs. No transcript of the proceedings had in the court where the judgment was rendered was ever filed in the appellate court and no appeal ever perfected.

44	58
47	325
48	155

44	58
50	186
53	196
53	480

44	58
57	752

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In a suit by the judgment creditor against the signers of said undertaking, *held*, (1) that the signers of the undertaking promised in effect to make good to the judgment creditor his judgment if it should remain unreversed; (2) the failure to perfect the appeal operated as an affirmance of the judgment rendered; (3) that the promise of the signers of the undertaking had been broken; (4) that the measure of damages of the judgment creditor was the amount due upon the judgment.

3. **Judgment Against Principal and Surety: ENTRY.** The provisions of section 511 of the Code of Civil Procedure are not applicable to a judgment rendered against the signers of an undertaking on appeal.
4. **Principal and Surety: APPEAL BONDS.** The liability of the signers of an appeal undertaking as between them and the judgment creditor is that of principal debtors.
5. **Action on Appeal Bond: DEFENSE.** In a suit against the signer of an appeal undertaking the fact that the judgment debtor has property out of which the judgment creditor could satisfy his judgment is not a defense in a suit at law.
6. ———: **EXECUTION: CONDITION PRECEDENT.** The issuing of an execution and its return unsatisfied is not a condition precedent to the right of a judgment creditor to maintain an action against the signer of an appeal undertaking executed to enable the the judgment debtor to appeal.

ERROR from the district court of Douglas county. Tried below before DAVIS, J.

David Van Etten, for plaintiff in error.

John P. Breen, contra.

RAGAN, C.

Before a justice of the peace in Douglas county Royal C. Cleveland obtained a judgment against C. D. May, H. L. May, and J. W. Cooper. Within ten days after the rendition of such judgment, Charles E. Seibert and John F. Flannagan executed before, and had approved by, said justice of the peace an appeal undertaking reciting the recovery of said judgment by Cleveland against May, and May

and Cooper, that the latter intended to appeal the case to the district court, and promising that they would prosecute their appeal to effect, and without unnecessary delay; and that said May, and May and Cooper, if judgment should be adjudged against them on appeal, would satisfy such judgment and costs.

No transcript of the proceedings had before said justice of the peace was ever filed in the office of the clerk of the district court, and no attempt seems to have been made to perfect an appeal from said judgment. After more than thirty days from the rendition of said judgment, Cleveland obtained a certificate from the clerk of the district court of Douglas county, certifying that there had been entered in his office no appeal of said case, and thereupon the justice of the peace issued an execution on the judgment against May, and May and Cooper, which was returned wholly unsatisfied. Cleveland then brought a suit before a justice of the peace on said appeal undertaking against Seibert and Flannagan. Flannagan was duly served with process in that action, but the officer returned that Seibert could not be found in Douglas county. Cleveland recovered a judgment against Flannagan, and the latter appealed. After the appeal to the district court, no service was had upon Seibert, and he did not appear either in person or by attorney. A trial was had which resulted in a verdict and judgment in favor of Cleveland against Flannagan, and the latter brings the case here for review.

1. The first assignment of error here is that as the appeal from the justice of the peace was never perfected, the action will not lie. Or, to state it differently, that the promise of Seibert and Flannagan was, that they would satisfy whatever judgment might be recovered against May, and May and Cooper in the appellate court, and that as the appeal was never perfected, and no judgment was ever rendered against them in the appellate court, that Seibert and Flannagan have not broken their promise. This precise

question was before this court in *Adams v. Thompson*, 18 Neb., 541, and it was there held, that the signers of an undertaking in appeal are estopped in a suit upon such undertaking from making the defense, that the appeal was not in fact perfected. (See, also, *Gudtner v. Kilpatrick*, 14 Neb., 347; *Duntermann v. Storey*, 40 Neb., 447.) By the undertaking in suit, Seibert and Flannagan promised that May, and others, would prosecute their appeal to effect, and without unnecessary delay. This they have not done, nor attempted to do, and the promise made by the signers of this undertaking has been broken, and Cleveland's measure of damages is the amount due upon the judgment. At the date of the rendition of the judgment by the justice of the peace, Cleveland was entitled to an execution for the satisfaction of such judgment. Seibert and Flannagan, by the execution of the appeal undertaking, deprived Cleveland of the right to have his judgment satisfied by an execution against the property of May and others. And the effect, if not the language, of their promise was to make good to Cleveland his judgment if it should remain unreversed.

2. At the close of the evidence counsel for the plaintiff in error moved the court to dismiss the action at the costs of Cleveland for failure to prosecute the action as against Seibert. The overruling of this motion is the second error assigned here. One of the defenses made by Flannagan to this action in the district court was that at the time Cleveland instituted this suit before the justice of the peace, and at the time of the trial in the district court Seibert, was a resident of Douglas county, and that Cleveland had made no effort to obtain service upon him, or, in the language of the 4th subdivision of section 430 of the Code of Civil Procedure, that Cleveland had failed to prosecute the action with diligence against Seibert. If the constable made a false return to the summons issued for Seibert and the plaintiff in error has been damaged thereby, he has his remedy against the constable and the sureties on his official

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bond, but we cannot say that the district court erred in overruling the motion under consideration. Whether or not Cleveland had failed or was failing to prosecute Seibert with diligence was a question of fact for the district court, to be determined as any other question of fact from the evidence before it. There is no evidence in the record that Seibert was a resident of Douglas county at the time Cleveland instituted the suit on this appeal undertaking before the justice of the peace, nor at any time since that date.

3. The third contention of the plaintiff in error is that the judgment rendered in this action is contrary to law because the clerk of the district court, in recording the judgment, has not certified that May and others were the principal debtors, and Flannagan and Seibert sureties, in accordance with the provisions of section 511 of the Code of Civil Procedure. But that section has no application to a judgment rendered against parties who execute an appeal undertaking. The liability of the signers of an appeal undertaking as between them and the judgment creditor is that of principal debtors. (Code of Civil Procedure, sec. 1014.)

4. Another contention is that the judgment is wrong because Cleveland had not tried in good faith to collect the judgment against May and others from them or their property. Plaintiff in error made this one of the defenses to this action, and was permitted by the district court to introduce evidence tending to show that May and others owned some property in Douglas county. The evidence offered, however, did not show that May and others had any property liable to execution at any time after the judgment was rendered against them in favor of Cleveland. And, as already stated, Cleveland had caused the justice of the peace, before whom his judgment was rendered, to issue an execution against May and others, and the officer had returned this execution unsatisfied. This defense then of the plaintiff in error entirely failed. But where a party

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executes an appeal undertaking, in a suit against him on such undertaking, the fact that the judgment debtor has property out of which the judgment creditor could satisfy his judgment is not a defense; and the issuing of an execution and its return unsatisfied is not a condition precedent to the right of the judgment creditor to maintain an action against the signers of an appeal undertaking executed to enable the judgment debtor to appeal from such judgment. (*Anderson v. Sloan*, 1 Col., 484.)

There is no error in the record and the judgment of the district court is

AFFIRMED.

IRVINE, C., not sitting.

MARGARET HOUSTON V. CITY OF OMAHA.

FILED FEBRUARY 19, 1895. No. 5503.

1. **Assignments of Error.** An assignment of error, "irregularity in the proceedings of the court and jury by which plaintiff was prevented from having a fair trial," specifically states no act done or omitted by either court or jury which this court can review.
2. ———. To enable this court to review an assignment of error, "misconduct of the jury," the action of the jury which it is claimed amounted to misconduct must be specifically stated in the petition in error, and the facts showing such misconduct sustained by affidavits filed in and brought to the attention of the district court on the hearing of the motion for a new trial.
3. ———. An assignment, "errors of law occurring at the trial," is sufficient in a motion for a new trial to enable the district court to pass upon the question as to whether it erred in the admission or rejection of evidence; but such an assignment in a petition in error presents nothing that can be reviewed by the supreme court.

44	63
44	507
44	63
48	298
44	63
54	71
54	803
44	63
57	413
44	63
58	661
44	63
60	383

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4. **Sufficiency of Evidence.** The evidence examined, and held to support the verdict of the jury.

ERROR from the district court of Douglas county. Tried below before DAVIS, J.

Fawcett, Churchill & Sturdevant and John P. Davis, for plaintiff in error.

E. J. Cornish and W. J. Connell, contra.

RAGAN, C.

Margaret Houston sued the city of Omaha in the district court of Douglas county for damages which she alleged she sustained on the 25th day of April, 1889, by falling through a defective sidewalk in said city. The city had a verdict and judgment and she brings the case here for review, and assigns the following errors:

1. "Irregularity in the proceedings of the court and jury, by which plaintiff was prevented from having a fair trial." This is the statutory ground for a new trial given by the first subdivision of section 314 of the Code of Civil Procedure. An assignment like this in the language of the statute, while sufficient in a motion for a new trial, is insufficient in a petition in error. If it is claimed that any act done or omitted by the court or jury was such an irregularity as prevented a party from having a fair trial, the petition in error should specifically state the act or omission complained of, otherwise this court cannot review the alleged error.

2. "Misconduct of the jury." This is the ground for a new trial provided by the second subdivision of said section 314. But to enable this court to review as an assignment of error the "misconduct of the jury," the action of the jury which it is claimed amounted to misconduct must be specifically alleged in the petition in error, and the facts showing such misconduct sustained by affidavits filed in the

district court and brought to the attention of that court on the hearing of a motion for a new trial. The record before us contains no affidavits directed to the subject of the misconduct of the jury. We cannot therefore review this assignment because it is too general and indefinite; and if the assignment were specific we would still be unable to review it because not supported by affidavits as provided by section 317 of the Code of Civil Procedure.

3. "Accident and surprise against which ordinary prudence could not have guarded." What has been said under the second assignment of error disposes of this assignment.

4. "The verdict and decision are not sustained by sufficient evidence and are contrary to law." The evidence is somewhat unsatisfactory, and the case is one of those which appeals strongly to the sympathies of the court, but we are constrained to say that we think that the verdict has sufficient competent evidence to support it.

5. "The plaintiff has newly discovered evidence material for her which she could not, with reasonable diligence, have discovered and produced at the trial, the same being supported by affidavit." We cannot review this assignment because the affidavits filed in the court below by the plaintiff in error, in support of her motion for a new trial on the grounds of newly discovered evidence, are not incorporated in the bill of exceptions. It has been so many times decided by this court that affidavits used in support of a motion for a new trial, to be available here, must be incorporated in the bill of exceptions, that it is unnecessary to cite the cases.

6. "There were errors of law occurring at the trial and excepted to by plaintiff." This assignment is sufficient in a motion for a new trial to enable the district court to pass upon the question as to whether it erred in the admission or rejection of evidence, but under such an assignment in a petition in error this court cannot review anything.

7. "The court erred in giving to the jury on his own

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motion the instructions numbered 1, 2, 3, 4, 4½, 5, 6, and the other instructions given by him, and the supplemental instructions given by him." The court did not err in giving all these instructions; and, where the assignment of error is that the court erred in giving all of a number of instructions, if any one of the instructions is good, the assignment must be overruled.

The judgment of the district court is

AFFIRMED.

SNYDER & DULL V. DAVID CRITCHFIELD.

FILED FEBRUARY 19, 1895. No. 5998.

1. Judgments of Courts of Other States: ACTION: DEFENSE.

A judgment of a court of a sister state, authenticated as prescribed by act of congress, is conclusive here upon the subject-matter of the suit. An action thereon can only be defeated on the ground that the court had no jurisdiction of the case, that there was fraud in procuring the judgment, or by defenses based on matters arising after the judgment was rendered.

2. ———: WARRANT OF ATTORNEY. A judgment entered in pursuance of a warrant of attorney, in a state in which such judgments are authorized, has the same force, when sued on here, as a judgment on adversary proceedings.

3. Action on Foreign Judgment: DEFENSE. In an action on such judgment, payment of the debt before judgment, that the foreign action was barred by the statute of limitations, or any other defense which applied to the original cause of action, cannot be availed of. The judgment itself is conclusive against such defenses.

4. ———: EVIDENCE: WARRANT OF ATTORNEY: APPEARANCE. Whether a warrant of attorney is sufficient under the laws of another state to authorize the appearance entered thereunder, is a question to be determined from the evidence as to the laws of that state.

5. **Warrant of Attorney: EVIDENCE.** Evidence in this case examined, and held to establish that the assignee of a note containing a warrant of attorney may in Pennsylvania avail himself of such warrant.

ERROR from the district court of Richardson county.
Tried below before BUSH, J.

J. D. Gilman and C. Gillespie, for plaintiffs in error, cited: 2 Black, Judgments, sec. 857; *McElmoyle v. Cohen*, 13 Pet. [U. S.], 312; *Chew v. Brumagen*, 13 Wall. [U. S.], 497; *Keeler v. Elston*, 22 Neb., 310; 4 Wait, Actions & Defenses, p. 192, and authorities cited; *Nicholas v. Farwell*, 24 Neb., 180; *Eaton v. Hasty*, 6 Neb., 427; *Spies v. Whitney*, 30 O. St., 69; *Braddee v. Brownfield*, 4 Watts [Pa.], 474; *Packer v. Thompson*, 25 Neb., 688; *Pringle v. Woolworth*, 90 N. Y., 502; *Specklemeyer v. Dailey*, 23 Neb., 101.

Edwin Falloon, contra:

The power of attorney contained in the note to confess judgment destroyed its negotiability. (*Sweeney v. Thickstun*, 77 Pa. St., 131; *First Nat. Bank of Carthage v. Marlow*, 71 Mo., 618; *Overton v. Tyler*, 3 Pa. St., 346; *Samstag v. Conley*, 64 Mo., 476.)

To assign a judgment note renders invalid the power of attorney contained in it. (*Osborn v. Hawley*, 19 O., 130.)

The note was twice assigned before plaintiffs became the owner and the assignees had no authority to confess judgment in favor of plaintiffs. (*Spence v. Emerine*, 15 Am. St. Rep. [O.], 634.)

The judgment was invalid because the rule of court requiring leave to enter it was not complied with. (*Cook v. Staats*, 18 Barb. [N. Y.], 407; *Ball v. State*, 2 S. W. Rep. [Ark.], 462; *Ingram v. Robbins*, 33 N. Y., 409.)

The power of attorney to confess judgment contained in the note is void for uncertainty. (*Carlin v. Taylor*, 7 Lea [Tenn.], 666.)

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No greater effect should be given to the judgment than it would have in the state where rendered. (*Wood v. Watkinson*, 17 Conn., 500; *Brown v. Parker*, 28 Wis., 21.)

The action is barred by the statute of limitations. (*Hower v. Aultman*, 27 Neb., 251; *Minneapolis Harvester Works v. Smith*, 36 Neb., 616.)

IRVINE, C.

This was an action by the plaintiffs in error against the defendant in error on a judgment alleged to have been recovered in Pennsylvania. The case was tried to the court, which found for the defendant. The only assignment of error calling for notice is the sufficiency of the evidence. The plaintiffs offered in evidence a transcript from the court of common pleas of Somerset county, Pennsylvania, which discloses the entry of judgment by confession against Critchfield and in favor of Austin Critchfield to the use of Perry Critchfield, to the use of Harrison Snyder and Rufus H. Dull, partners trading as Snyder & Dull. The confession of judgment was entered by attorneys under a warrant of attorney contained in a promissory note as follows:

“\$100.00.

APRIL 17th, 1873.

“Five months after date I promise to pay to the order of Austin Critchfield, one hundred dollars, without defalcation, value received, and further we do empower any attorney of any court of record within the United States or elsewhere, to appear for me and after one or more declarations filed confess judgment against me as of any term for the above sum with costs of suit, and attorney’s commission of ——— per cent for collection and release of all errors and without stay of execution, and inquisition and extension upon any levy on real estate is hereby waived, and condemnation agreed to and the exemption of personal property from levy and sale on any execution hereon, is also hereby expressly waived and no benefit of exemptions

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be claimed under and by virtue of any exemption law now in force or which may be hereafter passed.

"Witness my hand and seal.

"DAVID CRITCHFIELD. [SEAL.]"

There is no doubt of the principle that the judgment of a court of a sister state, authenticated as prescribed by the act of congress, is conclusive here upon the subject-matter of the suit. An action thereon can only be defeated on the ground that the court rendering the judgment had no jurisdiction of the case; that there was fraud in procuring the judgment; or by a defense based on matters arising after the judgment was entered, such as payment of the judgment or the statute of limitations. (*Eaton v. Hasty*, 6 Neb., 419; *Keeler v. Elston*, 22 Neb., 310; *Packer v. Thompson*, 25 Neb., 688.) A judgment entered on warrant of attorney in a state recognizing such a proceeding is as much an act of the court as if formally pronounced on *nil dicit* or a *cognovit*, and until it is reversed or set aside it has all the qualities and effects of a judgment on verdict. (*Braddee v. Brownfield*, 4 Watts [Pa.], 474.) A judgment entered in such a manner in a state recognizing such instruments, when sued upon here, must be treated as any other judgment. (*Nicholas v. Farwell*, 24 Neb., 180; *Sipes v. Whitney*, 30 O. St., 69.)

The defendant contends that this was not a valid judgment for a number of reasons. The first is that the note on which it was entered is not negotiable, and the warrant of attorney contained therein not assignable, from which it is argued that, the record disclosing that the note had been assigned and that the judgment was for the benefit of another than the payee, the warrant conferred no authority for the entering of defendant's appearance and the confession of judgment. This argument has the support of the supreme court of Ohio. (*Osborn v. Hawley*, 19 O., 130; *Spence v. Emerine*, 46 O. St., 433.)

It must be remembered that judgments on notes of this

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character are not known to the jurisprudence of our state, and that the note having been made in Pennsylvania and the judgment there rendered, the effect and validity of the contract must be determined by the law of Pennsylvania. What that law is was a fact to be established by evidence in this case. The evidence upon the subject consists of a statute, two decisions of the supreme court of Pennsylvania, and the depositions of two Pennsylvania lawyers. The statute is as follows: "It shall be the duty of the prothonotary of any court of record, within this commonwealth, on the application of any person being the original holder (or assignee of such holder) of a note, bond, or other instrument of writing in which judgment is confessed, or containing a warrant for any attorney at law, or other person to confess judgment, to enter judgment, against the person or persons who executed the same, for the amount which, from the face of the instrument, may appear to be due, without the agency of an attorney, or declaration filed with such stay of execution as may be therein mentioned, for the fee of \$1, to be paid by the defendant; particularly entering on his docket the date and tenor of the instrument of writing on which the judgment may be founded, which shall have the same force and effect, as if a declaration had been filed, and judgment confessed by an attorney, or judgment obtained in open court, and in term time; and the defendant shall not be compelled to pay any costs or fee to the plaintiff's attorney, when judgment is entered on any instrument of writing as aforesaid." (1 Purdon, Digest [11th ed.], p. 958, sec. 41.) The two decisions are *Overton v. Tyler*, 3 Pa. St., 346, and *Sweeney v. Thickstun*, 77 Pa. St., 131. What these cases decide is that the warrant of attorney in a promissory note renders it non-negotiable. This fact is not, however, important. Whether or not the note was negotiable under the law merchant it was assignable in equity, if not in law, and the right of the plaintiff to recover upon it in Pennsylvania would be a

question for the court which rendered the judgment to decide, and would not affect its jurisdiction. In order to reach the question of jurisdiction it would be necessary that the warrant of attorney should lose its force by the assignment of the note as the Ohio court holds that it does. In *Overton v. Tyler, supra*, the question was whether a note containing a warrant of attorney entitled the maker to days of grace. The court held that it did not because the note was not negotiable by the law merchant, and in the opinion Chief Justice Gibson, *arguendo*, but manifestly *obiter*, says: "A warrant to confess judgment, not being a mercantile instrument, or a legitimate part of one, but a thing collateral, would not pass by indorsement or delivery to a subsequent holder; and a curious question would be, whether it would survive as an accessory separated from its principal, in the hands of the payee for the benefit of his transferee. I am unable to see how it could authorize him to enter up judgment, for the use of another, on a note with which he had parted." The question was not before the court in that case, and the dictum of the learned chief justice cannot, therefore, be accepted as evidence of the law of the state on this point. The statute which we have quoted was adopted long before this decision. No reference is made to it in the report, but an inspection shows that the prothonotary is required to enter judgment on the application, either of the original holder or the assignee of any such holder. This statute would seem to be conclusive. Moreover, the two expert witnesses referred to both testify that the judgment is in due form of law, of a character often sustained by the courts of Pennsylvania, and that it is a valid judgment under the laws of Pennsylvania. We think, therefore, that the evidence requires the court to hold that the warrant of attorney authorized the entry of judgment on behalf of the assignee of the note.

It is next urged that the warrant of attorney is void for uncertainty. The evidence already referred to would seem

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to show that it was sufficient to meet the requirements of the law of Pennsylvania; and in *Nicholas v. Farwell, supra*, it was said by COBB, J., that a warrant similar in form to this was in the usual form of such instruments and authorized any attorney to enter the appearance of the signer of the note and confess judgment for him; that to this end it was not necessary that the defendant should be in court, nor, indeed, that he should have ever been in the state. The evidence shows that in Somerset county there is a rule of court that in certain cases, of which this appears to be one, leave of court must be obtained by motion for the entry of judgment, and such motion must be supported by affidavit that the warrant was duly executed, that the money is unpaid, and the party living. It is claimed that compliance with this rule was not shown, the affidavit having no venue. This does not, however, go to the jurisdiction of the court to render the judgment. If judgment were entered without such affidavit it would at most be an irregularity in the proceedings and would not oust the court of jurisdiction or subject the judgment to collateral attack. (*Nicholas v. Farwell, supra*; *Rising v. Brainard*, 36 Ill., 79.)

It is next claimed that the action is barred by the statute of limitations. The note was made in 1873, the judgment was rendered in Pennsylvania in 1891, and this action begun the same year. The claim is, therefore, not that the statute of limitations had run against the judgment, but that it had run against the original cause of action before suit was brought in Pennsylvania. The evidence is that the note being under seal, action on it was not limited by statute in Pennsylvania, but that the lapse of twenty years would raise the presumption of payment; therefore the action was not barred in Pennsylvania. But it is claimed that an action upon the note in this state would have been barred by our law, and that, therefore, the Pennsylvania judgment should not be enforced. We cannot assent to

Richardson v. Doty.

this reasoning. If the defendant was entitled to the benefit of any limitation that was a matter which must be availed of in the court where the judgment was rendered. It is an issue affecting the original cause of action, upon which the judgment concludes us. (*Packer v. Thompson*, 25 Neb., 688.)

Finally, the defendant claims that he had made a part payment on the note and had given to the original payee, in satisfaction of the remainder, a horse. The time of this transaction is not definitely fixed, but it was at least prior to 1879. This, then, was a defense to the original cause of action, and the judgment is conclusive on this also against the defendant. We think the evidence showed that the judgment was duly rendered by a court having jurisdiction to do so, and that no defense was shown.

REVERSED AND REMANDED.

WILLIS T. RICHARDSON, APPELLANT, v. IRA E. DOTY,
APPELLEE.

44	73
48	316
44	73
53	18

FILED FEBRUARY 19, 1885. No. 5781.

1. **Partnership: ACCOUNTING: EVIDENCE.** The evidence held sufficient to sustain the findings of the trial court.
2. **Set-Off: INSOLVENCY: EQUITY.** The provisions of the Code of Civil Procedure in regard to set-off are not exclusive. The insolvency of a party against whom the set-off is claimed is a sufficient ground for a court of chancery to allow it in cases not provided for by statute. *Thrall v. Omaha Hotel Co.*, 5 Neb., 295, followed.

APPEAL from the district court of Lancaster county.
Heard below before FIELD, J.

Richardson v. Doty.

Marquett, Dewese & Hall, R. S. Norval, and George P. Sheesley, for appellant.

Steele Bros. and G. M. Lambertson, contra.

IRVINE, C.

This was an action for an accounting between partners, the plaintiff Richardson alleging that about October 10, 1886, he and Doty entered into a partnership under a verbal contract for the purpose of building railroads and dealing in supplies for the construction of railroads; that Doty was to devote his entire time to superintending the work, and that the profits were to be shared equally. He then sets up three separate pieces of work performed during the existence of the partnership. One was the construction of a line of railroad known as the Culbertson Line, which he says that Doty, in disregard of his contract, neglected in such a manner as to cause a loss of \$2,000. Another was the construction of a line known as the Beaver Line, which he says yielded a profit of \$7,000, which Doty neglected and refused to account for. The third was the construction of bridges on a line known as the Wood River Line, and on which he alleges the profit amounted to \$4,000, which Doty neglected and refused to account for. Richardson then avers that on May 3, 1890, a new contract was entered into whereby the plaintiff was to receive two-thirds of the profits and the defendant one-third, except as to profits derived from selling supplies, which were to be equally divided, and avers that under this contract a line known as the Whitewood Line was constructed, but the work was performed by Doty negligently, causing a loss of \$4,000.

Doty answered, denying that the contract was as alleged, and averring that the partnership only extended to work performed on contracts made directly with railroad companies, and not to work done on subcontracts with princi-

pal contractors. He then avers that the Beaver Line and Wood River Line were subcontracts in his own favor and entirely outside the object of the partnership, and denies that he undertook to devote his time to the work of the partnership. He admits the construction of the Culbertson Line, but denies that he was guilty of any negligence. He admits the contract of May 3, 1890, and the construction of the Whitewood Line thereunder, and denies that he was guilty of any negligence therein. The answer then proceeds to allege that Doty became surety on certain notes of Richardson, and was compelled to pay the same, on which account he prays judgment for \$5,387.49, with interest. The reply admitted the allegations of the answer in regard to the set-off, but averred that they did not constitute any defense to the action. The court found that the subcontract work was not within the scope of the partnership; that on the Whitewood Line Doty should be charged \$800 for unfinished work, and that after that charge was made, the accounts of the two partners stood equal. Judgment was entered for the amount of the set-off in favor of Doty, and Richardson appeals.

With a single exception the questions presented are questions of fact. These were determined by the trial court on conflicting evidence. We have made a careful examination of the evidence, a task rendered quite difficult by the manifest incompetency of the reporter who prepared the transcript. It would be useless to encumber the reports with a discussion of the proof. We are satisfied that there was sufficient to sustain the findings of the district court.

The only question of law presented relates to the set-off pleaded and allowed by the district court. Whether the propriety of this set-off was properly questioned by the reply, which admitted the facts and merely as a legal conclusion denied that the set-off constituted a defense, is a point not raised by counsel, and one which we do not determine. The notes which were paid by the defendant do not appear

Richardson v. Doty.

to have been connected with the partnership, and plaintiff contends that for that reason they did not ground a set-off in this case. He also contends that the set-off was not proper because the notes were not paid until after the commencement of the action. A claim, to fall within the statutory provision as to set-off, must be one upon which the defendant might, at the commencement of the suit, have maintained an action against the plaintiff. (*Simpson v. Jennings*, 15 Neb., 671; *Tessier v. Englehart*, 18 Neb., 167.) But the answer alleges in a portion of the paragraph which the reply admits that the plaintiff was insolvent and that the defendant had no means of securing payment unless permitted to set off the claim in this action.

Sections 99 and 104 of the Code of Civil Procedure providing for set-offs are not exclusive. In *Boyer v. Clark*, 3 Neb., 161, it was said that set-off as a right demandable can only be applied to the purpose for which it is conferred by statute; but that the power to set off one judgment against another is one inherent in the court, the exercise of which is discretionary; and in *Thrall v. Omaha Hotel Co.*, 5 Neb., 295, it was said that the insolvency of the party against whom the set-off is claimed is a sufficient ground for a court of chancery to allow a set-off in cases not provided for by statute, and even in cases where the demands on both sides are not liquidated. In *Wilbur v. Jeep*, 37 Neb., 604, it was said that the insolvency of a judgment debtor invested the court with power to set off the judgment against the claim of the judgment debtor even in a case not provided for by statute. This case falls within the rule announced in the cases cited, and the district court did not err in allowing the set-off.

JUDGMENT AFFIRMED.

WILLIAM BARMBY ET UX. V. WILLIAM A. WOLFE.

FILED FEBRUARY 19, 1895. No. 6078.

1. **Assignments of Error: EVIDENCE.** An assignment of error that the verdict is against the weight of the evidence is not good. The assignment must be that the verdict is not sustained by sufficient evidence.
2. **Invalid Negotiable Instruments: RIGHTS OF BONA FIDE PLEDGEE.** Where a note is valid as between the original parties a pledgee may recover the whole amount thereof, retaining any surplus as trustee for the party beneficially entitled; but where the note is invalid as between the original parties a *bona fide* pledgee may recover only the amount of his advances, provided there be no other party in interest.
3. **Instructions: WEIGHT OF EVIDENCE: WITNESSES.** It is not erroneous to instruct the jury that while the defendants are competent witnesses, yet the jury have a right to take into consideration their interest in the result and all the circumstances surrounding them, and give to their testimony only such weight as in the judgment of the jury it is entitled to.
4. **Husband and Wife: ACTION ON NOTE: EVIDENCE.** Suit was brought on a note purporting to be signed by A and wife; evidence examined, and *held* sufficient to sustain the verdict against A, but insufficient to sustain the verdict against the wife.

ERROR from the district court of Gage county. Tried below before BABCOCK, J.

A. Hardy, for plaintiffs in error.

S. D. Killen and *L. M. Pemberton*, contra.

IRVINE, C.

Wolfe sued the plaintiffs in error, who are husband and wife, on a promissory note purporting to be signed by the plaintiffs in error, payable to the order of R. Holben, and by Holben indorsed to Wolfe as collateral security to a loan made by Wolfe to Holben. The Barmbys filed sepa-

44	77
47	137
47	763
48	232

44	77
49	732
50	654

44	77
56	635

44	77
61	666

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rate answers; there was a verdict against both; they filed separate motions for a new trial, which were overruled, and they bring the case here on separate petitions in error. We shall first consider the case of William Barmby.

By his answer he averred that since the making of the note it had been, without his consent and fraudulently, altered by inserting words of negotiability, and by adding a clause whereby his wife pledged her separate estate. He then averred that the plaintiff was not the owner of the note and pleaded a counter-claim in support of which no evidence was offered, and which was evidently waived at the trial. The first assignment of error is that the verdict is against "the great weight of evidence." This is not a proper assignment. A verdict will not be set aside simply because it is against the weight of the evidence. The assignment of error in regard to a matter occurring on the trial must be for some cause for which the Code authorizes a motion for a new trial. The assignment in the motion for a new trial must be that the verdict is not sustained by sufficient evidence. (Code Civil Procedure, sec. 314; *Durrell v. Hart*, 25 Neb., 610.) The next assignment is in proper form, that the verdict is not sustained by sufficient evidence. We think it is. The evidence tends to show that Holben and Barmby made an exchange of land; that there was on the land to be conveyed to Holben a mortgage of \$550; that this note was made to protect Holben against this mortgage. Barmby signed both his own and his wife's name to the note. The clause charging the wife's separate estate was inserted before the note was signed. The note contained words of negotiability when delivered to Holben. After its delivery to him, and before they separated, Barmby consulted a friend who advised him that inasmuch as the deeds could not be delivered for some time the note should not be made negotiable. The words of negotiability were then struck out; but, Holben asserting that he did not like this proceeding and that he wished to use the note, Barmby

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told him he could insert the words "or order" when the deeds were delivered. The deeds were delivered and Holben restored the words of negotiability. There is also evidence tending to show that Barmby saw the note after the change had been made and repeatedly promised to pay it. This testimony is by no means uncontradicted, but it was sufficient to sustain the verdict against Barmby.

The next assignment is that the verdict is excessive. This is based on the fact that the verdict was returned for the whole amount of the note, while the evidence showed that there remained unpaid to Wolfe on the debt for which the note stood pledged only about \$80. In *Haas v. Bank of Commerce*, 41 Neb., 754, it was said: "It is quite well settled that where a note is valid as between the original parties the pledgee may recover the whole amount of the note, retaining any surplus as trustee for the party beneficially entitled; but where the note is invalid as between the original parties the pledgee may recover only the amount of his advances, provided there be no other party in interest. (*Wiffen v. Roberts*, 1 Esp. [Eng.], 261; *Allaire v. Hartshorne*, 21 N. J. Law, 665; *Chicopee Bank v. Chapin*, 49 Mass., 40; *Union Nat. Bank v. Roberts*, 45 Wis., 373.)" This case falls in the former class. The defense was one which, if established, would defeat the note in the hands of an innocent holder. It is only where the plaintiff prevails merely because he is an innocent holder that he recovers simply the amount of the pledge. Where he recovers because a defense against the original payee is not established he recovers the amount of the note.

The giving and refusal of several instructions is assigned as error, but specific attention is called by the brief to only one instruction. The portion of this instruction objected to is as follows: "The court instructs the jury that while the law makes the defendants competent witnesses in this case, yet the jury have a right to take into consideration their interest in the result of your verdict and all the cir-

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cumstances which surround them, and give to their testimony only such weight as in your judgment it is entitled to." It has been held that in a criminal case it is not error for the court to refer in a similar manner to the credibility of the prisoner. (*St. Louis v. State*, 8 Neb., 405; *Murphy v. State*, 15 Neb., 383; *Housh v. State*, 43 Neb., 163; *Carleton v. State*, 43 Neb., 373.) In the two latest cases doubts were expressed as to the policy of such instructions, but the question was no longer deemed an open one. The cases referred to being criminal cases, and the witness to whose testimony attention was specifically drawn being the defendant himself, these cases are stronger than that before us. We find no error in the record as to William Barmby and the judgment against him must be affirmed.

The only assignment in Mrs. Barmby's petition in error which we shall consider relates to the sufficiency of the evidence. Mrs. Barmby was in California when the note was signed. She took no part in the transaction and knew nothing about it when it took place. Barmby signed her name to the note. There is no evidence to show that he was authorized to do so. An attempt was made to prove such authority. It was shown that he had exercised authority to buy and sell land on her behalf, but this would not imply authority to issue negotiable instruments and to pledge her separate estate. It is said that the fact that Barmby assumed to sign her name is evidence of his authority to do so. This is not true. Agency cannot be established by the acts or declarations of the agent. A witness was called and a vigorous effort was made to prove by him that Barmby had general authority to sign notes for his wife. The effort completely failed. It resulted only in proof that on one occasion Mrs. Barmby had, in the presence of the witness, authorized her husband to sign for her a particular note which was to be given to the witness. Proof of this special authority did not prove or tend to prove a general authority to sign notes; and while counsel were permitted

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to inquire of this witness after the manner of a cross-examination, the witness carefully and persistently refused to say that Mrs. Barmby's statement was anything more than a direction to her husband to sign this one note.

It was attempted to show that Mrs. Barmby had ratified her husband's act. Mr. Wolfe testified that he had written a letter to Mrs. Barmby in California and had received an answer purporting to come from her; that he had mislaid this letter, had searched for it and could not find it. He was then allowed to testify to its contents. The admission of this testimony is assigned as error, but we need not decide whether it was properly admitted, because, if admissible, it was insufficient to establish a ratification. Wolfe had twice sent the note to California for collection and had written several letters to Barmby about it. So far as appears the only effort had been to collect the note from Barmby. Wolfe then wrote a letter to Mrs. Barmby, the only information in the record as to its contents being that it "called her attention to the note." Mr. Wolfe's testimony as to the contents of the answer is: "She said her husband was away; that she would attend to the matter on his return and fix it up some way or another. She spoke about the small payment of \$80 which I wrote her would be sufficient to pay my claim as far as it went on the Barmby note. Q. What did she say about that? A. She wanted to know how that could be done." This was not sufficient to establish a ratification. It does not appear that payment was demanded from her, and Wolfe's testimony as to the contents of the letter does not show any promise that Mrs. Barmby would pay it. On the contrary, she said her husband was away; that on his return she would fix it in some way. This would indicate, if it indicates anything, that her language was used with reference to her husband paying the note. It discloses no recognition of the note as a valid obligation against her. The evidence was insufficient to sustain a verdict against Mrs. Barmby, and the

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judgment against her is therefore reversed and the cause remanded.

REVERSED AND REMANDED.

44 82
155 319

DENNIS C. BERRY, APPELLANT, v. H. G. WILCOX,
APPELLEE.

FILED FEBRUARY 19, 1895. No. 6052.

1. **Elections: VOTING PLACE OF UNIVERSITY STUDENTS.** The fact that one is a student in a university does not entitle him to vote where the university is situated, nor does it of itself prevent his voting there. He may vote at the seat of the university if he has his residence there and is otherwise qualified.
2. ———: ———: **RESIDENCE.** One's residence is where he has his established home, the place where he is habitually present, and to which, when he departs, he intends to return. The fact that he may at a future time intend to remove will not necessarily defeat his residence before he actually does remove. It is not necessary that he should have the intention of always remaining, but there must be no intention of presently removing.
3. ———: ———: ———. Persons otherwise qualified as voters who come to the seat of a university mainly for the purpose of obtaining an education, who are not dependent upon their parents for support, who have not the intention of returning to their parental home upon the completion of their studies, who are accustomed to leave the seat of the university during vacation, going wherever they might find employment, and returning to the university when the term opens, regarding the seat of the university as their home and having no purpose formed as to their movements after completing their studies, are entitled to vote at the seat of the university.

APPEAL from the district court of Lancaster county.
Heard below before TUTTLE, J.

Abbott, Selleck & Lane, for appellant, cited: *Fry's Election Case*, 71 Pa. St., 302; *Dale v. Irwin*, 78 Ill., 170;

Berry v. Wilcox.

Vanderpoel v. O'Hanlon, 53 Ia., 246; *Pedigo v. Grimes*, 13 N. E. Rep. [Ind.], 703; *Biddle v. Wing*, Clarke & Hall, Digest of Contested Elections, 504; *Barnes v. Adams*, 2 Bartlett, Cases of Contested Elections, 760.

Atkinson & Doty, contra, cited: *Behrensmeyer v. Kreitz*, 135 Ill., 591; *Dale v. Irwin*, 78 Ill., 170; Paine, Elections, secs. 69, 70; *Sturgeon v. Korte*, 34 O. St., 535; *Putnam v. Johnson*, 10 Mass., 487; *Lincoln v. Hapgood*, 11 Mass., 350; *Sanders v. Getchell*, 76 Me., 158.

IRVINE, C.

At an election held in the city of University Place, in Lancaster county, April 7, 1891, Berry and Wilcox were candidates for city clerk. The whole number of votes cast was 116, of which Wilcox received sixty-three and Berry fifty-three. Berry instituted this proceeding to contest the election on the ground that illegal votes had been received on behalf of Wilcox sufficient to change the result. In the county court there was a judgment for the incumbent, from which the contestant appealed to the district court, where a hearing was had with the same result, and the contestant now appeals to this court. The parties entered into a stipulation in regard to the facts, and this stipulation constitutes the only evidence in the case. From the stipulation it appears that seventeen votes were cast for Wilcox by students of the Wesleyan University, which has its seat in University Place. The result depends upon the right of these students to vote, and their right depends solely upon the question of their residence in University Place, it being conceded that they had all other qualifications of voters.

The facts as to the residence of these students appear from the stipulation as follows: "That they had been attending Wesleyan University and living in University Place from the commencement of the school year, some time during the month of September, 1890; that their main

purpose in going to and remaining in University Place was to attend said university for the purpose of obtaining an education; that all the said students had, previous to and immediately preceding the time they went to University Place for the purpose of attending the university, resided with their parents in different parts of the state of Nebraska, but were not dependent upon said parents for their support; that each of the said students expected to remain at said University Place during such time as their studies demanded until they had completed their college course; that none of the said students remained at said University Place during the vacation, but went wherever they could secure employment; that all of said students were uncertain and undecided as to their future course or place of residence upon the completion of their college course; that they did not have any special residence in view; that said students were all unmarried men without any business relations or connections at any other place, and that they were not engaged in any other business than that of attending the university; that none of said students were under parental control and that they regarded University Place as their home; that none of said students had at the time of voting any intention of removing from University Place before the completion of their studies, and that when they took their summer vacation they expected to return to the university upon the opening of the term." It is upon the foregoing facts that the question of their residence must be determined.

Our attention is called to chapter 26, section 32, Compiled Statutes, which provides that the judges of election and registrars of voters, in determining the residence of a person offering to vote, shall be governed by certain rules established in that section. But section one of article seven of the constitution prescribes the qualifications of voters: "Every male person of the age of twenty-one years or upwards belonging to either of the following classes, who

shall have resided in the state six months, and in the county, precinct, or ward, for the term provided by law, shall be an elector," etc. It is the constitution, then, which requires residence as a qualification for voting, although the legislature may fix the term of residence required in a county, precinct, or ward. What constitutes residence within the meaning of the constitution is, therefore, a judicial question and not one for the legislature. The question is, what did the word "reside" mean when the constitution was adopted, not what the legislature may say it shall mean. This is very clear. The constitution says likewise that "every male person," etc., shall be an elector. It would be clearly incompetent for the legislature to extend this provision to females by passing an act declaring that in determining who are male persons, judges of election shall consider both men and women such. We do not say that the section referred to has no force; merely that it cannot be accepted as in anywise enlarging or limiting the provisions of the constitution. We do not even say that the rules prescribed by that section are not correct rules for determining the question of residence; but if they are so, it is because there are only declaratory of the previous law and not because the legislature has adopted them. We therefore proceed with the inquiry without any special reference to this statute. The generally accepted definition of "residence," when the term is used with reference to the qualification of voters, is synonymous with "domicile,"—"that place * * * in which his habitation is fixed, without any present intention of removing therefrom." (Story, Conflict of Laws, 43.) The older cases and some of the modern ones require as an essential element the *animus manendi*, and construe this term as meaning an intention of always remaining. The supreme court of Iowa must have adopted this rule in the case of *Vanderpoel v. O'Hanlon*, 53 Ia., 246, for in that case it was held that a student at the state university was not a resident of Iowa City, although he

did not know what he would do after he graduated, and was not aware that he would leave Iowa City. The case referred to is one of the latest cases in which this extreme view is taken, and the opinion cites with approval the *Opinion of the Judges*, 5 Met. [Mass.], 587, and *Fry's Election Case*, 71 Pa. St., 302. The former case we shall refer to later. *Fry's Election Case* is a carefully considered case, and its result was to hold that students of a college living where it is located, even though they be supported by themselves and emancipated from their father's family with no intention to return to his home, have not such residence as will entitle them to vote at the seat of the college. That case was, however, professedly based to a large extent on early definitions of the terms "inhabitant" and "freeman," as well as upon the debates in the convention which adopted the constitution; and as the reasoning proceeds upon ancient authorities the case should properly be considered as among the ancient cases. It is worthy of remark, however, that the statement of facts shows that the students came to the college for no other purpose than to receive an education and intended to leave after graduating; whereas, in the case before us it is only agreed that their education was the main purpose of the students in coming and that they had no purpose formed as to their movements after graduation.

In *State v. Griffey*, 5 Neb., 161, it was held that persons who went to a military post in Valley county for the purpose of working there, but without the intention of returning to their former domicile, acquired a residence. And in *Swaney v. Hutchins*, 13 Neb., 266, it was said: "The test of residence, when a party removes from one state to another, seems to be, did he remove from his former residence with the intention of abandoning the same?" In *Putnam v. Johnson*, 10 Mass., 488, it was held that a student at Andover, otherwise qualified and being emancipated from his father's family, was entitled to vote at Andover.

Berry v. Wilcox.

This case proceeded upon the ground that he had manifestly abandoned his former domicile, and must therefore be domiciled at Andover, or no place. The old theory of *animus manendi* was perhaps first combated in that case, the court saying: "In this new and enterprising country it is doubtful whether one-half of the young men, at the time of their emancipation, fix themselves in any town with an intention of always staying there. They settle in a place by way of experiment, to see whether it will suit their views of business and advancement in life; and with an intention of removing to some more advantageous position if they should be disappointed. Nevertheless, they have their home in their chosen abode while they remain."

A very instructive opinion was given by the justices of the supreme judicial court to the house of representatives of Massachusetts in 1843 (5 Met., 587); and while, of course, this opinion is open to the criticism of being merely a response to a legislative inquiry, and not an opinion delivered in the judicial determination of a case, still the high character of the judges who signed it, as well as the soundness of the views expressed, entitle it to great weight. The question there proposed was, "Is a residence at a public institution in any town in this commonwealth, for the sole purpose of obtaining an education, a residence within the meaning of the constitution which gives a person, who has his means of support from another place either within or without this commonwealth, a right to vote or subjects him to the liability to pay taxes in said town?" It was said that none of the circumstances mentioned constitute a test, nor are they very decisive upon the question; that one's residence for the purpose of education would not give one the right to vote if he had a domicile elsewhere, nor would his connection with a public institution for the purpose of education preclude him from voting, if his domicile is there. That what place is any one's domicile is a question of fact; that if a student have a father living, if

he remain a member of his father's family, if he return to pass his vacations, if he be maintained by his father—these are strong circumstances repelling a presumption of a change of domicile. But if he be separated from his father's family, not maintained by him; if he remove to a college town and take up his abode there without intending to return to his former domicile, these are circumstances more or less conclusive to show the acquisition of a domicile in the town where the college is situated. The same view was taken in *Sanders v. Getchell*, 76 Me., 158.

The supreme court of Ohio, quoting Story's definition of domicile, adds: "It is not, however, necessary that he should intend to remain there for all time. If he lives in a place with the intention of remaining for an indefinite period of time as a place of fixed present domicile and not as a place of temporary establishment, or for mere transient purposes, it is to all intents and for all purposes his residence." (*Sturgeon v. Korte*, 34 O. St., 525.)

In *Dale v. Irwin*, 78 Ill., 170, the court said: "What is 'a permanent abode'? Must it be held to be an abode which the party does not intend to abandon at any future time? This, it seems to us, would be a definition too stringent for a country whose people and characteristics are ever on the change. No man in active life in this state can say, wherever he may be placed, this is and ever shall be my permanent abode. It would be safe to say a permanent abode, in the sense of the statute, means nothing more than a domicile, a home, which the party is at liberty to leave, as interest or whim may dictate, but without any present intention to change it."

These authorities, we think, present the law in its true aspect. The fact that one is a student in a university does not of itself entitle him to vote where the university is situated, nor does it prevent his voting there. He resides where he has his established home, the place where he is habitually present and to which when he departs he intends

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to return. The fact that he may at a future time intend to remove will not necessarily defeat his residence before he actually does remove. It is not necessary that he should have the intention of always remaining, but there must co-exist the fact and the intention of making it his present abiding place, and there must be no intention of presently removing. Now in the case before us these students came to University Place, their main purpose being to attend the university. They were emancipated from their parents, apparently with no intention of returning to the home of their parents; they regarded University Place as their home, leaving it during vacation and going wherever they could obtain employment, with the intention of returning to University Place at the close of the vacation. They were uncertain as to their course upon graduation and therefore had no particular future residence in view. There can be no doubt that they had lost their residence at the homes of their parents, and they were men without a country, if they had not acquired one in University Place. We think the county and district courts reached the correct conclusion on these facts in holding that these students had acquired a residence in University Place.

JUDGMENT AFFIRMED.

MICHAEL McCAULEY, APPELLEE, V. CHARLES OHEN-
STEIN ET AL., APPELLANTS.

FILED FEBRUARY 20, 1895. No. 5543.

1. **Quieting Title: PLAINTIFF'S PROOFS.** In an action to quiet title, when the plaintiff's title is put in issue by the answer, he is required to establish upon the trial that he is the owner of the legal or equitable title to the property, or has some interest therein, superior to the rights of the defendant, in order to entitle him to the relief demanded.

McCauley v. Ohenstein.

2. **Tax Deeds: TREASURERS' SEALS.** Inasmuch as the legislature has failed to provide for an official seal for county treasurers, no tax deed executed under the revenue law of 1879 is of any validity. *Larson v. Dickey*, 39 Neb., 463, adhered to.

APPEAL from the district court of Lancaster county.
Heard below before TIBBETS, J.

Thomas C. Munger, for appellants.

R. D. Stearns, contra.

NORVAL, C. J.

On the 4th day of August, 1870, the state of Nebraska, by a deed duly executed by the governor, and attested by the secretary of state, conveyed to one Paren England lot one (1) in block two hundred and one (201) in the city of Lincoln, which deed was recorded September 10, 1870. Subsequently, on August 29, 1870, said Paren England, together with his wife, by a deed of general warranty duly executed and acknowledged, conveyed said lot to one Charles Ohenstein, which instrument was filed for record on the next day after its date. On the 22d day of May, 1884, the above described lot was sold by the county treasurer at private sale for taxes levied thereon for the years 1872 to 1882, inclusive, amounting to \$17.80, and a tax deed was executed to the purchaser, Bartholomew Mahoney, on the 19th day of April, 1887, who executed and delivered a quitclaim deed for the premises to the plaintiff, Michael McCauley, on December 30, 1889.

On October 26, 1889, J. B. Trickey & Co. commenced an action in the district court of Lancaster county against Charles Ohenstein to recover the balance due upon an account. A writ of attachment was sued out of said court, and the lot in question was seized thereunder. Afterward, judgment was rendered in the action against the defendant for the sum of \$10, and costs taxed at \$35.35, and the sher-

iff was ordered to proceed as upon execution to advertise and sell said lot to satisfy the judgment and costs aforesaid. Thereupon this action was begun in the court below by Michael McCauley against Charles Ohenstein and J. B. Trickey & Co. to quiet the title to said lot in the plaintiff, alleging in the petition that he is the owner in fee, and in possession of the premises, and has made lasting and valuable improvements thereon; that the judgment in favor of J. B. Trickey & Co. is void; that the same and the deed from England to Ohenstein are a cloud upon the plaintiff's title to said premises.

J. B. Trickey & Co. filed an answer denying the averments of the petition, and setting up the judgment and proceedings in the attachment; that said judgment is unpaid, and is a valid, subsisting lien against said lot. The reply is a general denial. On the trial the court found the issues against the defendants, J. B. Trickey & Co., enjoining them from proceeding to sell the lot under their judgment, and quieted the title thereto in the plaintiff. The defendants appeal.

It is argued that the findings and judgment are not sustained by sufficient evidence. Plaintiff in his petition alleges ownership in himself to the premises in dispute. His title was put in issue by the answer, therefore he was required to establish upon the trial that, at the commencement of the action, he was the owner of the legal or equitable title to the property, or had some interest therein, in order to entitle him to the relief demanded. Upon the trial plaintiff introduced in evidence the tax deed mentioned above, under and through which alone he claims to be the legal owner of the real estate in question. The defendant insists that the tax deed is invalid and conveyed no title to the lot to the grantee therein named, for the reason that the instrument is void on its face for the following reasons:

1. It shows that the sale was not made for all the taxes thereon delinquent against the property.

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2. In that it fails to recite that the lot had been previously offered for sale, and not sold for want of bidders, the lot having been sold at private sale.

3. The deed fails to recite when the sale was made.

4. Because no valid tax deed can be executed in this state under the law now in force.

It will be unnecessary to consider the first three objections made, since the decision upon the fourth, or last, ground must be adverse to the plaintiff. The point was raised and passed upon in *Larson v. Dickey*, 39 Neb., 463, in the able and exhaustive opinion of RAGAN, C. The fifth point of the syllabus reads as follows: "There is no such thing as a county treasurer's official seal of office provided for or recognized by the laws of this state, and until the legislature shall provide for an official seal for county treasurers, no tax deed of any validity can be executed under the present revenue law."

We are satisfied with the reasoning of the opinion in *Larson v. Dickey*, and, applying the rule therein stated to the case at bar, the conclusion is irresistible that the tax deed in question is void and was insufficient alone to convey title to the plaintiff to the premises in controversy. The conclusion reached makes it unnecessary to determine whether the judgment in favor of J. B. Trickey & Co. is valid and constitutes a lien upon the real estate involved in this case, since the plaintiff, in an action to quiet title, as in a suit in ejectment, must obtain relief upon the strength of his own title, and not because of the weakness of the title of his adversary. (*Blodgett v. McMurtry*, 39 Neb., 210.)

The evidence fails to support the findings, and the decree of the lower court quieting the title to the lot in the appellee is reversed, and the action dismissed.

REVERSED AND DISMISSED.

W. T. SCOTT, APPELLEE, V. R. L. SPENCER ET AL., IM-
PLEADED WITH METCALF CRACKER COMPANY,
APPELLANT.

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44	309
44	98
61	838

FILED FEBRUARY 20, 1895. No. 5943.

1. **Pleading: AMENDMENT.** This court may, under the provisions of section 144 of the Code, allow amendments in order to conform the pleadings to the facts proved in the trial court, provided such amendments do not change substantially the cause of action or defense.
2. ———: **AMENDMENTS AFTER JUDGMENT.** But amendments will not be allowed after judgment which change substantially the nature of the action or defense.
3. **Review: BILL OF EXCEPTIONS.** The only means provided for the ascertainment by this court of the character of the evidence introduced before the district court is a bill of exceptions authenticated in the manner prescribed by law.

MOTION for rehearing of case reported in 42 Neb., 632.

H. H. Wilson and Dryden & Main, for the motion.

POST, J.

As intimated in the opinion heretofore filed in this case (42 Neb., 632), the proceeding below was one for the enforcement of a mechanic's lien against certain property in the city of Kearney, in which the appellant the Metcalf Cracker Company was alleged to have an interest.

The answer was in effect a disclaimer of title by the defendant named, which alone appeals from a decree for the plaintiff based upon a general finding in his favor. The argument of counsel for appellant when the cause was first submitted to us was directed to the merits of the controversy, but an examination of the record disclosed that the so-called bill of exceptions had not been authenticated in the manner prescribed by law in order to give it force or

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effect as such. The decree of the district court was accordingly affirmed on that ground without reference to the issues presented by the pleadings. It is on this hearing practically conceded that the Metcalf Cracker Company has according to the pleadings no appealable interest, for the reason, as above shown, that the decree is for the enforcement of a lien against property as to which it has disclaimed title. However, in connection with the motion for a rehearing counsel for the appellant submit an application for leave to amend its answer so as to conform to the issues actually tried. Accompanying said application are certain affidavits, including one by the presiding judge, to the effect that the cause was tried in the district court on its merits, and that the answer was therein construed not as a disclaimer but as putting in issue the validity of the alleged lien.

Our Code makes provision for amendment after judgment in certain cases as follows: "The court may, either before or after judgment, in furtherance of justice, and on such terms as may be proper, amend any pleading, process, or proceeding, by adding or striking out the name of any party, or by correcting a mistake in the name of a party, or a mistake in any other respect, or by inserting other allegations material to the case, or when the amendment does not change substantially the claim or defense, by conforming the pleading or proceeding to the facts proved. And whenever any proceeding taken by a party fails to conform in any respect to the provisions of this code, the court may permit the same to be made conformable thereto by amendment." (Sec. 144, Code.) Frequent constructions have been given the above provision, and its meaning as applied to the trial court is, we think, well understood. But in its application to this court, in proceedings brought here by petition in error or appeal, greater difficulty is encountered. The instances in which the rule of the statute has been invoked in favor of parties seeking to amend

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in this court are few and will be noticed in the order reported.

In *Humphries v. Spafford*, 14 Neb., 488, LAKE, C. J., said: "We have no doubt whatever that an amendment at this stage of the case is in harmony with section 144 of the Code, where the ends of justice seem to demand it." The facts therein are not fully reported and it does not appear whether the proofs were received without objection, but the inference is that the evidence was before the court. True it is said by the author of the opinion: "If the amount due on the notes be as we infer from the brief of counsel, greater than is alleged," etc. But the argument referred to was evidently predicated on the facts disclosed by the record, since the court could not have based a material finding upon the unsworn statements in the brief.

In *Spellman v. Frank*, 18 Neb., 110, an amendment was allowed by the county court in which the cause originated, but was not in fact made. On the hearing before the district court, on petition in error, leave was asked to amend in conformity with the order of the county court, which was denied and which request was renewed in this court and again refused. The character of the amendment does not appear, but it cannot be inferred from the report that any objection was made on the ground of materiality, or that the amendment sought was not in furtherance of justice.

In *Homan v. Steele*, 18 Neb., 652, it was argued that the plaintiff's remedy was by an action on a *quantum meruit*, and not on the contract alleged. Referring to the subject, Judge MAXWELL said: "Where proof has been introduced without objection, which would entitle a plaintiff to recover, this court would, if necessary, permit an amendment of the petition to conform to the proof, or remand the cause to the district court for that purpose." The language here used appears the more consonant with the spirit of the provision for amendments after judgment after conforming the

pleadings or proceedings to the facts proved when the amendment does not change substantially the claim or defense. The provision referred to is a substantial copy of section 137 of the Ohio Code, which according to Judge Nash had received a definite construction in that state long previous to its adoption by this. The author named, after an exhaustive analysis of the provision under consideration, summarizes as follows: "We conclude, therefore, that the identity of the action cannot be changed by an amendment, whether in regard to the cause of the action or the parties to it. Where the action is founded on a legal right this rule must be strictly applied. In chancery cases the rule heretofore prevailing in courts of equity will still prevail and be liberally applied to cases *in rem* or in equity. No other construction can be given to the section without unsettling all certainty in the administration of justice and all uniformity in the practice of courts; since such practice will be but the individual discretion of the court or judge; whereas a court must have rules even for the exercise of its discretion, so that it may mete out to all the same administration of the law." (1 Nash, Code Pleading, 323.)

In Boone, Code Pleading, sec. 234, it is said: "Amendments after trial are very cautiously allowed, and the general rule is that a party who has not sought to amend until after he has been nonsuited is too late to ask for a new trial and an amendment." And the proposition thus stated is in accord with the views of other writers. (See Bliss, Code Pleading, sec. 429 *et seq.*; Maxwell, Code Pleading, pp. 577, 578; Elliott, Appellate Procedure, sec. 610.) Nor is the doctrine above asserted without support from the decisions in point. In *Smith v. Mayor of New York*, 37 N. Y., 518, application was made to the court of appeals for leave to amend so as to change the action from one for breach of an implied contract, to one for money had and received; but Hunt, C. J., denied the motion, using the following language: "I have never known the exercise of

such a power by this court. * * * In no event could it be granted except by a motion," etc. In *Fitch v. Mayor of New York*, 88 N. Y., 500, Danforth, J., in denying leave to amend, refers to section 723 of the New York Code, from which section 144 of our Code was copied, in the following language: "If the section (723) applies to this court the power should not be exercised unless it is plain that no substantial right of the adverse party would be affected. Here the case has been tried upon a different issue, and without amendment disposed of by the general term. The application should have been to that court or to the trial court." In *Romeyn v. Sickles*, 108 N. Y., 650, it was held error to permit an amendment in a material respect to be made except at a time which will afford the adverse party an opportunity to meet by proof the new allegations; and in *Southwick v. First Nat. Bank of Memphis*, 61 How. Pr. [N. Y.], 164, it is said: "If a party can allege one cause of action and then recover upon another his complaint will serve no useful purpose, but rather to ensnare and mislead his adversary." In *Levy v. Chittenden*, 120 Ind., 37, it is said: "This court has always held that it is error to allow an amendment to the pleadings which changes the nature of the cause of action or defense, after the trial has been concluded."

But it should be remembered that the Code refers not to forms, but causes of action, a proposition of which *Homan v. Steele* is an excellent illustration. There the action was for money due on contract; but the plaintiff's right to recover on the agreement being in doubt, on account of a failure to complete the building named within the stipulated time, the case was within the letter as well as the spirit of the Code.

The wisdom of the rule is fittingly illustrated by the case at bar. For if it be permissible to a party to a bill for the foreclosure of a mortgage or other lien, to disclaim interest in the subject of the action, and after final decree

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assert an adverse title by way of amendment, it may with truth be charged that written pleadings are designed to mislead and ensnare litigants rather than to secure the orderly administration of justice. It remains to be determined whether we shall examine the affidavits presented in order to ascertain what issues were actually tried. The fact must not be overlooked that the object of this proceeding is to secure the reversal or modification in this court of the decree appealed from. Had the application been made to the district judge who heard the proofs, the case would have presented no difficulty, as he would have known whether the proposed amendment conformed to the facts proved or presented a new and distinct issue. But our examination is necessarily confined to the record and that record must be one authorized by law. It must also be authenticated in the manner prescribed by statute. Leave in this instance to amend without a reversal or modification of the decree, accompanied by an order remanding the cause, would be a fruitless result of the appeal. And yet the vacation by this court of a judgment or decree upon *ex parte* affidavits as to what transpired before the trial court would be an anomaly in judicial proceedings, and so radically opposed to the settled rules of practice that an examination of the cases bearing upon the subject would be a work of supererogation. We confess to having vainly sought for safe ground upon which to sustain the application in this case.

We are assured by counsel, whose unsworn statements to us impart absolute verity and who are not responsible for the misadventure resulting in the failure to secure a bill of exceptions, that the question actually tried was the validity of the lien as against the appellant as owner, for building material furnished to Spencer, his co-defendant. Such a case must appeal strongly to any court, and more especially to one exercising equitable powers. But a vacation of this decree implies not only a violation of the let-

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ter of the Code, but also a reversal of those rules of practice which experience has shown to be necessary in the due administration of the law, and without which injustice and confusion will inevitably follow. The motion for a rehearing is accordingly denied.

MOTION DENIED.

WILLIAM F. LORENZEN ET AL. v. KANSAS CITY INVESTMENT COMPANY.

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FILED FEBRUARY 20, 1895. No. 5616.

1. **Deceit: FALSE REPRESENTATIONS: INJURY.** In an action in the nature of an action of deceit, it is necessary not only to show the making of false representations justifiably relied upon, but in addition it must be made directly and not by conjecture to appear that, from such false representations and reliance upon them, there resulted a direct and actual loss to plaintiff.
2. ———: **EVIDENCE.** The evidence and petition in this case reviewed, and *held* to have justified an instruction to find for the defendant.

ERROR from the district court of Douglas county. Tried below before DOANE, J.

The facts are stated by the commissioner.

E. J. Cornish, for plaintiffs in error:

If there is any evidence to support a verdict, it is error to direct the jury to find for the defendant. (*Johnson v. Missouri P. R. Co.*, 18 Neb., 690.)

The petition was modeled after the petition sustained in *Booker v. Puyear*, 27 Neb., 346.

A *prima facie* case of conspiracy was proved, although for the purposes of this trial it was not necessary to be proved. (*Booker v. Puyear*, 27 Neb., 346.)

Promises which the promisor does not intend to fulfill at the time of making them, and upon which another has relied to his damage, are fraudulent. (*Oldham v. Bentley*, 6 B. Mon. [Ky.], 430; *Nichols v. Pinner*, 18 N. Y., 306; *Johnson v. Monell*, 2 Keys [N. Y.], 663; *Schufeldt v. Schnitzler*, 21 Hun [N. Y.], 462; *Burrill v. Stevens*, 73 Me., 395; *Rawdon v. Blatchford*, 1 Sandf. Ch. [N. Y.], 344; *Durel v. Haley*, 1 Paige Ch. [N. Y.], 492.)

The representation of a fact in the future, and not a mere promise, which has been acted upon and turns out to be false, will entitle the injured party to the same remedies as fraudulent misrepresentations of an existing fact. (*Abbott v. Abbott*, 18 Neb., 504, and cases cited; *Henderson v. San Antonio & M. G. R. Co.*, 17 Tex., 560.)

It is not necessary, to sustain an action for deceit, that the defendant should be benefited by the deceit, or that he should collude with the person who received the benefit. (*Haycraft v. Creasy*, 2 East [Eng.], 92; *Russell v. Clarke*, 7 Cranch [U. S.], 69; *Upton v. Vail*, 6 Johns. [N. Y.], 181; *Patten v. Gurney*, 17 Mass., 182; *Medbury v. Watson*, 6 Met. [Mass.], 246; *Ewin v. Calhoun*, 7 Vt., 79; *Hubbard v. Briggs*, 31 N. Y., 529.)

The Kansas City Investment Company is bound by the acts of its agent. (*Olmstead v. New England Mortgage Security Co.*, 11 Neb., 487; *Cheney v. White*, 5 Neb., 261; *Cheney v. Woodruff*, 6 Neb., 151; *Cheney v. Eberhardt*, 8 Neb., 423; *Wilson v. Beardsley*, 20 Neb., 451; *McKeighan v. Hopkins*, 19 Neb., 38; *Gerhardt v. Boatmans Saving Institution*, 38 Mo., 60; *Henderson v. San Antonio & M. G. R. Co.*, 17 Tex., 560; *Locke v. Stearns*, 1 Met. [Mass.], 560; *Griswold v. Haven*, 25 N. Y., 595; *Johnson v. Barber*, 5 Gilman [Ill.], 425.)

Slight evidence of collusion is sufficient to let in proof of acts and declarations of co-conspirators. (*Brown v. Herr*, 21 Neb., 125; *Turnbull v. Boggs*, 43 N. W. Rep. [Mich.], 1050.)

Cook & Gossett and McCoy & Olmstead, contra.

RYAN, C.

This action was brought in the Douglas county district court by plaintiffs in error against Alfred Lindblom, Nels O. Brown, and the Kansas City Investment Company for the recovery of damages to the amount of \$16,000. It was charged in the petition that the defendants entered into a conspiracy having for its object the cheating and defrauding of plaintiffs, and obtaining the title to and the possession of certain real property owned by plaintiffs without paying therefor. The manner in which it was charged that this was undertaken was that to Alfred Lindblom was procured to be sold the property for \$16,000, of which sum \$4,000 was to be paid in cash, the balance to be evidenced by his notes, secured by a mortgage back on the property sold him; that by fraudulent representations as to the financial responsibility of Nels O. Brown, for whom Alfred Lindblom was the *alter ego*, the plaintiffs were induced to make the proposed sale and consent to have their mortgage security postponed to that of the Kansas City Investment Company. From the record before us it is not made to appear why the Kansas City Investment Company is made the sole defendant in error, but from the brief of plaintiffs in error it appears that a judgment had been rendered against the other defendants before the rendition of the judgment involved in this proceeding. The part which the Kansas City Investment Company was charged with taking in the above alleged scheme was that said company, by its agent, represented and induced plaintiffs to believe that Nels O. Brown was worth \$50,000 to \$75,000 in his own right; that Lindblom was in his employ, and that Brown and Lindblom had \$4,000 in cash to make the above required payment; that the said investment company would loan Brown and Lindblom \$21,000,

secured by first mortgage on the property to be conveyed, the proceeds of which loan would be paid by the investment company itself for labor and material to be used in the construction of eight buildings on the lots to be sold Lindblom and Brown; that said investment company further represented that it had taken a good bond which would fully guard against the filing of mechanic's liens against said property when it should be acquired and improved by Lindblom and Brown, and that said investment company agreed that it would see that the application of the proceeds of the loan should be made as above contemplated, and that if the work should not be done according to contract said investment company, upon being notified of that fact by Lindblom and Brown, would withhold further payments until the work should be properly done. It was further alleged that the investment company represented to plaintiffs that Brown and Lindblom were practical carpenters and themselves would do a large part of the work, and that said houses, when completed, would be worth \$21,000. Plaintiffs averred that they relied upon these representations whereby they were induced to convey the lots which they owned to Lindblom; that the cash payment of \$4,000 was made with a part of the loan advanced for that purpose by the investment company; that both Brown and Lindblom were insolvent; that the payments made of the amount loaned were not applied on material furnished or labor done; that upon notice that the work was not being done according to contract the investment company did not so require it to be done; that all the material used did not cost in excess of \$3,800, for which amount a lien had been filed, and that the value of the real estate was \$16,000. In general, it was further averred that the investment company had in every respect refused to perform its undertakings, and that by reason thereof and of its false representations the plaintiffs had been damaged in the sum for which judgment was prayed. Is-

sues were duly joined on all the material allegations of the petition, and after the introduction of all the evidence the jury were instructed to find in favor of the defendant in error. From a judgment rendered on this verdict, error proceedings have been prosecuted to this court.

The evidence showed that the terms of the intended sale were arranged between plaintiffs and Lindblom and Brown in the latter part of August, 1889; that the first interview between plaintiffs and the investment company took place on September 10 thereafter; that in this interview it was disclosed by the investment company that it proposed to make a loan of \$21,000, secured by first mortgages on the property owned by plaintiffs after it should have been conveyed to the other parties; that a bond had been taken by said company to indemnify it against the filing of mechanics' liens; that Mr. Lorenzen read this bond; that he asked the agent of the investment company if it was intended to furnish the \$4,000 to make the cash payment required to induce plaintiffs to convey, and the answer of this agent not being satisfactory Mr. Lorenzen stated to the agent that the sale would not be consummated upon the required cash payment being made in that way. A party who had bargained for the same real property as is now under consideration before plaintiffs agreed to convey to Lindblom, and who had procured the substitution of Lindblom and Brown for himself, after the above conversation, procured a written statement from the agent of the investment company addressed to himself, that the said company would advance upon the proposed loan the sum of \$4,800 whenever the mortgages in its favor were made the first recorded liens on the property to be conveyed. The purpose for which this statement was procured was not disclosed to the investment company or its agent, but the party who received it borrowed \$4,000 on the faith of it, and with that \$4,000 Lindblom and Brown made the cash payment required to satisfy plaintiffs to close up the trade. Afterward, without

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the slightest intention of doing wrong, and indeed without knowledge of the purpose for which the aforesaid statement had been procured, or used, the investment company paid the sum of \$4,800 as it had indicated that it would, and this enabled the bank to obtain payment of the aforesaid loan. On the trial we have not been able to find that any proof was made of the value of the real property at that time. It was, however, admitted that there had been obtained decrees of foreclosure on the several mortgages which secured the aggregate loan made by the investment company in the United States circuit court for the district of Nebraska, and that a motion to open said decrees was pending when this trial was had. There had, therefore, taken place no judicial sale which would have afforded evidence that the security held by plaintiffs for their deferred payments were of no value. This suit against the defendant in error was in the nature of an action for deceit. The end sought by the false representations as charged was the procuring of plaintiffs to part with their real property upon insufficient security for the payment of the purchase price. The fact that the security so obtained to be accepted was inadequate was an element indispensable to the establishment of an actual loss sustained. As the proofs stood when the case was submitted to the jury, there had been no conspiracy shown, neither had there been proved a single fact tending to connect the investment company with any fraud or misrepresentation. When we take into account the further fact that there had been no affirmative showing that the plaintiffs would not be able to collect the entire amount of their claim by a foreclosure sale of the mortgaged premises, we conclude that the district court properly directed a verdict in favor of the defendant. Its judgment is therefore

AFFIRMED.

STANDARD STAMPING COMPANY V. LEVI G. HETZEL
ET AL.

FILED FEBRUARY 20, 1895. No. 5819.

1. **Attachment: AFFIDAVITS: HEARING ON MOTION TO DISSOLVE.** Where it was alleged in the petition in an attachment case that the defendants acted conjunctively, the first named buying on credit and turning over goods to the second to be disposed of by him for the joint benefit of both, it was proper on a motion to dissolve such attachment to consider whether or not there existed the alleged privity between the defendants.
2. **—: MOTION TO DISSOLVE: TRIAL.** On a motion to dissolve an attachment the levy upon property, as that of a defendant, forbids plaintiff's denial that such defendant has an ownership interest therein.
3. **—: DISSOLUTION: SPECIAL FINDINGS.** Where an attachment had previously been dissolved upon a full hearing of the merits, there existed no requirement that upon request, sustained by affidavits, additional special findings should be made, and it was not erroneous on motion to strike such affidavits from the files.

ERROR from the district court of Douglas county. Tried below before KEYSOR, J.

Caranagh, Thomas & McGilton, for plaintiff in error:

The court erred in considering and determining the question of partnership between the defendants. (Drake, Attachment, sec. 418; *Alexander v. Brown*, 2 Dis. [O.], 396; *Hermann v. Amedee*, 30 La. Ann., 393; *Kuehn v. Paroni*, 19 Pac. Rep. [Nev.], 273; *Olmstead v. Rivers*, 9 Neb., 234.)

Cowin & McHugh, contra:

The affidavit is a sufficient and complete denial of the grounds of attachment and raised an issue which went directly to the right of the plaintiff to maintain its attachment. (*Leach v. Cook*, 10 Vt., 239; *Taylor v. McDonald*,

4 O., 150; *Cowdin v. Hurford*, 4 O., 133; 2 Bates, Partnership, sec. 1117.)

The action of the trial court in considering the evidence introduced upon the question of the alleged partnership of the defendants, for the purpose of determining the truth of the allegations of the affidavit for attachment, was necessary and proper. (*Reed v. Maben*, 21 Neb., 696; *Hamilton v. Johnson*, 32 Neb., 730; *Bundrem v. Denn*, 25 Kan., 430; *Stapleton v. Orr*, 23 Pac. Rep. [Kan.], 109; *Guest v. Ramsey*, 33 Pac. Rep. [Kan.], 17.)

The order of the trial court in discharging the attachment upon motion of defendant Frank J. Hetzel was proper. (*Windt v. Banniza*, 26 Pac. Rep. [Wash.], 189; *Claflin v. Detelbach*, 28 Atl. Rep. [N. J.], 715; *Mayer v. Zingre*, 18 Neb., 458; *Dolan v. Armstrong*, 35 Neb., 339.)

RYAN, C.

Plaintiff brought suit in the district court of Douglas county against the defendants named, as individuals, for the recovery of judgment in the sum of \$348.13, alleged to have been due, and the sum of \$1,067.71 about to become due when suit was brought. An attachment was, at the commencement of the suit, procured to be issued against the property of the defendants, but was levied on a stock of groceries of which the defendant Frank J. Hetzel claimed to be the owner. From an order dissolving said attachment plaintiff has prosecuted error proceedings to this court. In the petition were averments as follows:

“2. The defendants are a partnership doing business in the city of Omaha, Nebraska, in the wholesale and retail grocery business, but are not doing business as such partnership under any firm name.

“3. The defendants, although partners, were and are doing business as such wholesale and retail grocers at three points in said city and state; one store under the name of the ‘Mammoth,’ on the west side of Sixteenth street, between Dodge

and Douglas streets; one store under the name of the 'Bee Grocery Company,' on Sixteenth street, between Cass and California streets; and one store near the corner of Twenty-fourth and Cuming streets under the name of L. G. Hetzel.

"4. That between June 14th and August 11th, 1892, plaintiff sold and delivered to the said defendants, at the special instance and request of the said L. G. Hetzel, goods, wares, and merchandise of the value of \$1,415.84, * * which said wares and merchandise were purchased for the said defendants jointly, and exposed for sale in their three several places of business."

Following the above allegations there were averments in the petition that, previous to a date in 1892 not given, the defendants had held themselves out to the public as partners, but had then pretended to dissolve said partnership relation, and, from thenceforward, each defendant had pretended to engage in business for himself and on his own sole account, but, as plaintiff charges upon belief, there existed a conspiracy between the defendants to defraud wholesale houses by buying largely on credit and selling and concealing as many of their goods as it was possible, leaving said wholesale houses unpaid; that to facilitate said fraudulent plan, and as part thereof, the pretense of dissolution had been resorted to, after which Levi G. Hetzel in his own name purchased goods from as many wholesale houses as would give him credit, and from these goods furnished the store which it was pretended was being run by Frank J. Hetzel as his own; that said goods so purchased by Levi G. Hetzel were for the benefit of both of said defendants and were purchased in pursuance of said plan to defraud, and that Frank J. Hetzel received the portion of said goods so furnished him in pursuance of said plan to defraud, and to enable said Levi G. Hetzel to defraud, and for the purpose of defrauding the plaintiff. In connection with the above averments there was given a statement of the dates at which would fall due the amounts for which judgment

was prayed. The affidavit for an attachment likewise described these amounts, and the date of maturity of each, and, in addition, contained allegations that the defendants had sold, conveyed, or otherwise disposed of their property with intent to defraud their creditors, and were about to remove their property, or a material part thereof, with the intent, or to the effect, of cheating or defrauding their creditors, or hindering them in the collection of their debts.

The motion to dissolve the attachment was filed on behalf of Frank J. Hetzel alone. It was heard and determined upon consideration of a large amount of evidence presented by affidavits, and of still more abundant testimony given orally. With the result attained we cannot interfere, for the findings of a trial court as to the existence of facts established upon the consideration of conflicting evidence are conclusive when the proofs are such that different minds therefrom might fairly draw different conclusions.

It is strenuously urged by the plaintiff in error that since in the petition there were averments of the existence of a partnership between the defendants, that question was one which could properly arise only upon the issue made by a denial of this averment in the answer, and that, therefore, the district court erred in considering whether or not the alleged partnership relation actually existed. The goods attached were claimed by Frank J. Hetzel. By the attachment of these goods as the property of both the defendants there was a recognition by plaintiff that Frank J. Hetzel had an interest in them as an owner. If, in fact, Frank J. Hetzel was the sole owner of the attached property he was entitled to have the attachment thereon dissolved unless, in some way, there was shown a privity between the defendants, for the plaintiff itself in its petition had alleged that the sale of the goods was made to Levi G. Hetzel. In this connection there were extended averments of a partnership relation under and by virtue of which the

property purchased was by Levi G. turned over to his brother in pursuance of a common purpose between these brothers of perpetrating a fraud, or series of frauds. These averments, it will be noticed, were not made as mere elaborations of the grounds of attachment prescribed by statute, but rather were the statements of facts upon which it was sought to hold Frank J. liable personally for the goods sold. If the district court could not consider whether or not the privity alleged had an existence, it would result, of necessity, that in the petition there was no averment under which Frank's property could be attached, for in that event there would exist no grounds for holding liable either himself or his property. There was introduced a great deal of evidence which tended, unexplained and uncontradicted, to show that Levi had fraudulently transferred his property to Frank. If the goods had been attached in the hands of Frank, as in reality the property of Levi, placed in Frank's hands for the purpose of defrauding the creditors of Levi, this would have been competent. But such was not the case; the property was attached as that of both Levi and Frank. It was therefore necessary, in view of the plaintiff's averment that the goods were in reality sold to both, though the transaction was with Levi alone in his own name, to show that there existed a privity between Frank and Levi in order to sustain the attachment sued out and levied as it was. Upon consideration of all the evidence adduced there was no sufficient proof to satisfy the court that, in purchasing, Levi acted for Frank, either as a partner or otherwise, hence it resulted that in so far as Frank's interests were concerned the attachment was properly dissolved.

Probably for the purpose of prosecuting with distinctness some questions deemed important, the plaintiff, after the motion to dissolve the attachment had been sustained, filed certain affidavits with a request for specific findings not theretofore made. On motion these affidavits were

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stricken from the files. There exists no rule which requires, upon questions of the nature of those presented in this case, that the district court must make special findings of fact or conclusions of law upon request so to do. In this case there had already been made sufficient findings to justify the order dissolving the attachment. There was, therefore, no error in striking the affidavits from the files as was done. The judgment of the district court is

AFFIRMED.

IRVINE, C., not sitting.

44	110
46	315
44	110
55	338

**B. O. PERKINS ET AL., APPELLANTS, V. BUTLER COUNTY
ET AL., APPELLEES.***

FILED FEBRUARY 20, 1895. No. 5659

1. **Assignment of Unearned Money Under Contract.** An assignment of moneys not yet earned, but expected to be earned in the future under an existing contract, is in equity valid and enforceable.
2. **Insolvent Partnership: DISTRIBUTION OF ASSETS.** When a partnership is dissolved and is insolvent, its assets will be treated by a court of equity as a trust fund for the payment of partnership creditors, and the creditors of one partner will not be permitted to divert the assets to the prejudice of the partnership creditors.
3. **Partnership: CONTRACT FOR BUILDING COURT HOUSE: FIRM ASSETS: RIGHTS OF LABORERS AND MATERIAL-MEN.** A and B were partners and had a contract for the construction of a court house for Butler county. During the progress of the work the partnership was dissolved, it being agreed that A should complete the court house and receive for himself any profits accruing thereon. He gave a bond to B to indemnify B against liabilities arising out of the court house contract. B agreed that A might use the firm name in completing the court house.

* A rehearing has been allowed.

Thereafter A borrowed money which he used in completing the court house. The money was borrowed on a note signed by A individually and indorsed by C and D. To secure them A made in the firm name an order upon the county directing the payment to C and D of fifteen per cent of the contract price which was by the contract reserved until the court house was finished. It did not appear that C and D indorsed the note on the credit of the firm of A and B or on the faith that the money would be used in the building. Thereafter A and B gave orders against the same fund to various persons who had performed work or furnished material for the building. C and D were compelled to pay A's note. *Held*, That the finding of the trial court that the debt from A to C and D was the individual debt of A was in accordance with the evidence ; that as between A and B, the county, and laborers and material-men the fund was partnership assets, and that the laborers and material-men were entitled to be paid therefrom prior to C and D.

APPEAL from the district court of Butler county. Heard below before WHEELER, J.

George P. Sheesley, R. S. Norval, and George W. Lowley, for appellants, cited: 1 Bates, Partnership, sec. 559; 2 Bates, Partnership, secs. 679, 707, 824; *Warren v. Martin*, 24 Neb., 273; 3 Pomeroy, Equity Jurisprudence, secs. 1280, 1283.

Leese & Stewart, also for appellants.

Steele Bros., Evans & Hale, M. A. Hall, and Frick & Dolezal, contra :

The assets of an insolvent partnership are a trust fund for the payment of partnership creditors. (*Till's Case*, 3 Neb., 261; *Roop v. Herron*, 15 Neb., 73; *Caldwell v. Bloomington Mfg. Co.*, 17 Neb., 489; *Rothell v. Grimes*, 22 Neb., 526; *Smith v. Jones*, 18 Neb., 481, *Banks v. Steele*, 27 Neb., 138.)

A surviving partner, or a partner who succeeds to the business of a firm for the purpose of completing and winding up its affairs, may pledge property to secure partnership

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debts, but such partner cannot enter into a contract by which partnership assets are diverted, or by which an additional liability would be created against the estate of a deceased or retiring partner. (*Holland v. Fuller*, 13 Ind., 195; *Tiemann v. Molliter*, 71 Mo., 512; *Hayden v. Cretcher*, 75 Ind., 108; *Bank of South Carolina v. Humphreys*, 1 McCord [S. Car.], 388; *Cotton v. Evans*, 1 Dev. & B. Eq. [N. Car.], 284; *Veale v. Hassan*, 3 McCord [S. Car.], 278; *Lee v. Stowe*, 57 Tex., 444; *Kendall v. Riley*, 45 Tex., 20; *Dowzelot v. Rawlings*, 58 Mo., 75; *Bank of Port Gibson v. Baugh*, 9 S. & M. [Miss.], 290.)

The claim of appellants is a new obligation. It is one existing in favor of a creditor who was such at the time of dissolution. This new obligation and liability Chidester had no right to incur, even if he had undertaken to do so in the firm name. (*Hayden v. Cretcher*, 75 Ind., 108; *Bowman v. Blodgett*, 2 Met. [Mass.], 308; *Bank of Port Gibson v. Baugh*, 9 S. & M. [Miss.], 290; *Dowzelot v. Rawlings*, 58 Mo., 75; *Rice v. McMartin*, 39 Conn., 573; *Sutton v. Dillaye*, 3 Barb. [N. Y.], 529; *Cotton v. Evans*, 1 Dev. & B. Eq. [N. Car.], 284; *Veale v. Hassan*, 3 McCord [S. Car.], 278; *Van Doren v. Horton*, 19 Hun [N. Y.], 7; *Lee v. Stowe*, 57 Tex., 444; *Kendall v. Riley*, 45 Tex., 20; *Roots v. Mason City Salt & Mining Co.*, 27 W. Va., 483.)

It was the moral duty of the county, and the legal duty of Barras, to see that the labor and material creating the fund was paid out of it. (*Sample v. Hale*, 34 Neb., 220.)

Appellees also made reference to the following cases: *Bennett v. Buchan*, 61 N. Y., 222; *Robbins v. Fuller*, 24 N. Y., 570; *Van Doren v. Horton*, 19 Hun [N. Y.], 7; *McClelland v. Remsen*, 23 How. Pr. [N. Y.], 175; *Thursby v. Lidgerwood*, 69 N. Y., 198.

IRVINE, C.

In 1889 William J. Chidester and C. F. Barras were copartners under the name of Chidester & Barras. In that

year they entered into a contract with Butler county for the construction of a court house, for which they were to receive \$47,700. The contract provided for the payment to Chidester & Barras each month of eighty-five per cent on materials furnished and labor performed during the month, the remaining fifteen per cent to be paid after the work was completed. Some time after this contract was entered into work was begun on the court house and continued by Chidester & Barras until October 22, 1890, when the copartnership was dissolved. The terms of the dissolution were evidenced by several instruments. By one of these Barras agreed that if Chidester should give him a good and sufficient bond to hold him harmless against all loss or damage for which Chidester & Barras might become liable for any failure, fraud, or neglect upon their part in and about the construction of the court house, or for any loss for work, labor, or material furnished, or for any failure on the part of Chidester to pay for labor or material used in the construction of the court house, then Barras would waive all claims for any profit which might accrue in the construction of the court house; and Barras further agreed "that the said Chidester shall use the firm name in and about the construction of said court house." Another instrument is the bond referred to. A third instrument is an agreement of dissolution, whereby all unsettled business was to be settled as soon as practicable, and the profits or loss shared equally, and Chidester, in consideration of the relinquishment by Barras of all claims to any profit arising from the court house contract, was to obtain an additional surety on the indemnity bond to Barras. Another instrument is a notice of dissolution signed by both partners and published at the time. This notice recited that the court house contract was to be carried out by Chidester; that he was authorized to receive all payments, and that he was responsible for all bills for labor and material performed and furnished, and that Chidester was to use the

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firm name to complete the building, and Barras was not to use the firm name in any future transactions. A still further instrument is a receipt by Barras from Chidester for \$150, in full for all claims on the court house contract.

From these instruments it is clear that it was the intention of the parties to effect a dissolution as of October 22, 1890, so far as practicable; that Barras received \$150 in lieu of other demands on account of the court house, and Chidester undertook to indemnify him from liability on account of that contract. It is also clear that between the partners it was understood that Chidester should proceed alone with the work. But it is equally clear that Chidester and Barras recognized the fact that as to third persons their existing contract liabilities could not be affected, and so it was expressly agreed that Chidester might use the firm name in the fulfillment of the court house contract. Chidester proceeded with the work, and in December induced Perkins and Spelts, the plaintiffs, to sign as joint makers with him a promissory note, to the order of the Columbia National Bank of Lincoln, for \$4,000. This note was discounted by the bank and the proceeds placed to Chidester's credit individually and not to the credit of Chidester & Barras. Chidester testifies that his object in obtaining this money was to use it on the court house contract, and the evidence shows that nearly all of it was so used. At the time this note was made Chidester delivered to Perkins & Spelts the following instrument:

"To the Honorable Board of Supervisors and County Treasurer of Butler County, Nebraska: Please pay to B. O. Perkins and L. Spelts all of the fifteen per cent now due and which will be due us on the court house contract and this shall be your receipt for same said 15 per cent, being \$7,155. Dated at David City, Neb., this 9th day of Dec., in the year 1890.

CHIDESTER & BARRAS,
"By W. J. CHIDESTER."

It does not appear that there was any agreement between Chidester and the plaintiffs that the money should be used for the court house, nor that they supposed that they were dealing with the firm of Chidester & Barras in signing the note. It does not even appear that they were informed what Chidester's purpose was in procuring the loan. The most that can be said is that Perkins at least evidently relied largely on the assignment of the fifteen per cent reserve fund to secure him in his suretyship. This note was once or twice renewed and was finally, on July 6, 1891, paid by Perkins and Spelts. On December 30, 1890, Perkins and Spelts had filed the assignment with the county clerk of Butler county. The court house was completed and accepted about May 28, 1891, and there was found to be due from the county to Chidester & Barras \$8,344.82. At the time the work was completed a number of orders were given against this fund in favor of persons who had performed labor or furnished material for the court house. Some of these orders were signed by both Chidester and Barras, some of them were signed in the firm name by Barras alone. There is evidence sufficient, at least to sustain the finding to that effect by the district court, that at the time of the dissolution Chidester & Barras were insolvent. Perkins and Spelts, after paying the note, brought this action against Butler county, Chidester, and the laborers and material-men praying that they be decreed entitled to payment of the money due from Chidester from the fund in the hands of the county, prior to the payment of the other parties.

The county answered, admitting the contract with Chidester & Barras, the completion and acceptance of the court house, and that there was due thereon the amount already stated. It then pleaded the presentment to it of the various orders, and prayed the adjudication by the court of the respective claims of the plaintiffs and of the laborers and material-men, and the protection of the court in

the disbursement of the money. The numerous laborers and material-men filed answers, putting plaintiffs' claims in issue, and cross-petitions setting up claims in themselves to the fund. The court found that the moneys in the hands of Butler county were partnership assets of Chidester & Barras, and that the laborers and material-men were creditors of the firm, and the plaintiffs were individual creditors of Chidester; that Chidester & Barras were insolvent. The court then found the amount due each of the laborers and material men, classifying their claims in groups, but ordering the payment of all before the payment of any money to the plaintiffs. From this decree the plaintiffs appeal.

There is but little controversy as to the facts, but the discussion of law has taken a wide range. We think a few considerations are sufficient to resolve the case to a single question, or group of questions. In the first place, whatever may have been the law formerly, and however such a transaction may be regarded now in a court of law, it is settled that in equity an assignment of moneys not yet due or earned, but which are expected to be earned in the future under an existing contract, is binding and will be enforced. (*East Lewisburg Lumber & Mfg. Co. v. Marsh*, 91 Pa. St., 96; *Ruple v. Bindley*, 91 Pa. St., 296; *Taylor v. Lynch*, 5 Gray [Mass.], 49; *Payne v. Mayor*, 4 Ala., 333; *Greene v. Bartholomew*, 34 Ind., 235; *Spain v. Hamilton's Administrator*, 1 Wall. [U. S.], 604.) The principle of these cases has been fairly recognized by this court. (*Code v. Carlton*, 18 Neb., 328.) The recent case of the *Union P. R. Co. v. Douglas County Bank*, 42 Neb., 469, is not contrary to this rule. In that case the assignment was held subject to the claims of employees because the assignment was construed as an assignment of the contract *cum onere*, and not merely an assignment of moneys to be earned in the future under the contract. In determining priorities as between different assignments of this character, the general

rule is that that assignment which is first brought to the notice of the debtor has priority. Several of the above cases illustrate this principle. The assignment to Perkins and Spelts was undoubtedly founded on a valuable consideration, and in view of the principles already stated would be entitled to priority over the claims of the cross-petitioners, did they emanate from the same source and on the same account. It is suggested in argument that the cross-petitioners are entitled to priority because their work contributed to the creation of the fund, but this view is not tenable. Our mechanic's lien law does not apply to the construction of a court house. (*Ripley v. Gage County*, 3 Neb., 397; *Sample v. Hale*, 34 Neb., 220; *Lyman v. City of Lincoln*, 38 Neb., 794.) In the absence of a statute creating such a lien one obtains no specific lien upon a fund merely because his industry assisted in creating it.

The principal argument in favor of appellees is that the indebtedness to the plaintiffs was the individual indebtedness of Chidester, and that the assignment of the moneys accruing to Chidester and Barras to secure this individual debt of Chidester was inoperative as against the creditors of the partnership. It is certainly well settled in the jurisprudence of this state that when a partnership is dissolved or is insolvent its assets will in a court of equity be treated as a trust fund for the payment of partnership creditors, and that one partner or the creditors of one partner will not be permitted to divert the assets to the prejudice of the partnership creditors. (*Till's Case*, 3 Neb., 261; *Bowen v. Billings*, 13 Neb., 439; *Roop v. Herron*, 15 Neb., 73; *Caldwell v. Bloomington Mfg. Co.*, 17 Neb., 489; *Smith v. Jones*, 18 Neb., 481; *Rothell v. Grimes*, 22 Neb., 526; *Banks v. Steele*, 27 Neb., 138; *Tolerton v. McLain*, 35 Neb., 725.) The case of *Roop v. Herron*, *supra*, would, indeed, be very closely in point and decisive in favor of the appellees here, were it not that in the former case the indebtedness contracted by the individual partner was very

clearly his own debt, and was not used in any manner on behalf of the firm.

We, therefore, have two rules well established. The first that the assignment to the plaintiffs was one which, in equity, is valid, and would have priority over the claims of the cross-petitioners if all the claims emanated from the same source, and upon the same account. Second—That one member of an insolvent partnership, especially after dissolution, may not dispose of partnership property to the exclusion of partnership creditors. This brings us to the crucial questions in this case. Was the indebtedness to plaintiffs the individual debt of Chidester? Do the cross-petitioners occupy the position of partnership creditors? and, finally, is the fund in dispute partnership assets?

We have no doubt in resolving the last two questions. It was beyond the power of Chidester and Barras to dissolve their partnership in such a manner as to affect the rights of the county, or those of strangers, under the court house contract. This fact they recognized and did not seek to combat. While they arranged between themselves a special settlement of the matters growing out of this contract, it was recognized that Barras' liability to third persons continued and he took a bond to indemnify him therefrom. He also expressly authorized Chidester to use the firm name in prosecuting the contract. For the purpose of completing existing contracts a partnership continues after it is otherwise dissolved; and while the partners may change their relations as between themselves in regard to such contracts, their relations to third persons continue the same. We have no doubt that the fund in dispute, notwithstanding the agreement of Chidester and Barras as to its disposition, remained as between them, the county, and the cross-petitioners partnership assets.

The remaining question is one of greater difficulty. The appellees argue that the loan to Chidester cannot be treated as a partnership transaction because one partner,

after dissolution, can make no new contract; but we have seen that Chidester was given power to complete the existing court house contract, and incidentally, by necessary implication, the power to make new contracts with strangers for the purpose of completing that contract.

In *Mason v. Tiffany*, 45 Ill., 392, George B. Tiffany & Co. made a contract with Mason and others for the manufacture of a number of boilers. Before their delivery Tiffany died. The surviving partners, who continued the business in the old name, received the boilers and in the firm name executed notes for the purchase price. It was held that the estate of Tiffany was liable upon the notes because they were merely given in the fulfillment of a contract made before the dissolution.

In *Butchart v. Dresser*, 10 Hare [Eng.], 453*, A and B were partners as commission brokers, and also bought and sold shares on their own account. The partnership was dissolved, and thereafter A deposited with certain bankers shares which the firm before dissolution had contracted to buy, and obtained advances to pay for the shares on the security of the deposit, signing a power in the name of the firm to sell the shares if the debt was not paid in a certain time. It was held that in the completion of the contract made before dissolution one partner had the power to borrow in the firm name and pledge the partnership assets to secure payment. This case was affirmed on appeal. (*Butchart v. Dresser*, 4 De Gex, M. & G. [Eng.], 542.)

We are aware that in *Levi v. Latham*, 15 Neb., 509, this court held that one partner in a non-trading partnership cannot bind his copartner by a promissory note made in the firm name, unless he has express authority therefor, or the giving of such note is necessary to the carrying on of the business, or is customary in similar partnerships; but we think this case would fall within one of the exceptions. If the borrowing of this money was necessary to complete the court house contract, Chidester would have authority to

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borrow it and pledge the firm's credit for its payment. We hold, therefore, that under the terms of the dissolution and the facts of the case Chidester had power to borrow money to complete the court house on the credit of the firm. The question is, did he do so? The note was signed by Chidester alone, and, as we have said, there is no evidence that the plaintiffs, in becoming sureties, relied on the use of the money in building the court house. They did rely on the assignment of the fund, but not on the personal credit of the partnership.

In *Habig v. Layne*, 38 Neb., 743, one partner purchased materials to be used in the construction of a building which was being erected by the partnership. The contract for the material was in writing and in the name of the individual partner. It was held that it was a question of fact for the determination of the jury whether the contract was that of the individual or of the firm.

In *Holland v. Fuller*, 13 Ind., 195, A and B had indorsed the paper of the firm C and D. C died. A and B then indorsed the individual paper of D on his own security alone. With the proceeds of this individual paper D paid off the partnership paper on which A and B were liable. D failed and assigned to A and B certain property, including assets of the late firm of C and D. It was held that the assignment of these assets was void and that A and B could not be substituted in the place of the original creditors of the firm. This case is authority for holding that the mere fact that Chidester used the proceeds of the note in the construction of the court house would not entitle the plaintiffs to rank as partnership creditors.

In *Hayden v. Cretcher*, 75 Ind., 108, after the dissolution of a partnership, one partner, who had agreed to pay the debts of the firm, borrowed money to pay the firm debts and executed a note in the firm name. The payee of the note did not lend the money on the credit of the firm or on that of the retiring partner. He advanced the

money before the note was executed and did not know that the note was to be in the firm name. It was held to be the individual debt of the borrowing partner, and the fact that the money was used to pay the firm's debts did not render the retiring partner liable.

We think, therefore, that the plaintiffs can claim nothing merely because the money was used for the purpose of the partnership. The question is not what was the money used for, but upon whose credit was plaintiffs' indorsement obtained. The transaction was with Chidester; they knew of the dissolution; they signed his individual note and in their petition in this action they recite that they signed the note "for the purpose of aiding the said Chidester to perform said contract * * * and thereby enable said defendant to procure a loan." The petition, then, in alleging the payment by the plaintiff of the note says: "Whereby the said W. J. Chidester became and is now indebted to the plaintiffs," and the prayer is for judgment against Chidester. The plaintiffs did not even make Barras a defendant. He came in by a petition of intervention. We think the finding of the trial court that this was the individual debt of Chidester is supported by the evidence. This being true, Chidester had no right, to the exclusion of partnership creditors, to pledge partnership funds to secure the debt, and the assignment was void as to the partnership creditors.

The appellants place much reliance upon the case of *Warren v. Martin*, 24 Neb., 273. We do not think the case in anywise conflicts with the view we have taken. All that case decides is that one partner may pay his individual debt out of the funds of the partnership when his interest justifies it, and that his creditor receiving partnership funds in payment will be protected either by the acquiescence of the other partners, or by ignorance of the fact that the partner paying the money was not authorized to pay it out of that fund. In this case there is no pre-

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tense that the relations of the parties were not understood by the plaintiffs. They chose to become sureties for the individual indebtedness of Chidester; they knew the partnership had been dissolved except for the purpose of completing this contract, and they were bound to know that Chidester could not transfer to them partnership assets to secure his individual debt to the prejudice of partnership creditors.

JUDGMENT AFFIRMED.

NORVAL, C. J., not sitting.

44	122
45	616

CYRUS W. FISHERDICK V. ALEXANDER H. HUTTON.

FILED MARCH 5, 1895. No. 6401.

1. **Written Instruments: ALTERATION: MATERIALITY.** An alteration of a written instrument after its execution by one party thereto, without the knowledge or consent of the other, which neither varies its meaning nor changes its legal effect, is an immaterial alteration, and will not invalidate the instrument.
2. ———: ———: ———: **QUESTION OF LAW.** Whether an alteration is material or immaterial, is a question of law for the court.
3. ———: ———: ———: ———. It is error to submit the question of alteration to the jury, where the alteration is immaterial.

ERROR from the district court of Lancaster county. Tried below before HALL, J.

J. R. Webster and *Halleck F. Rose*, for plaintiff in error:

An alteration is immaterial when the law would supply the matter added. (*Burnham v. Ayer*, 35 N. H., 351; *Western Building & Loan Association v. Fitzmaurice*, 7 Mo. App., 283; *Goodenow v. Curtis*, 33 Mich., 505; *Bridges*

v. Winters, 42 Miss., 135; *Sharpe v. Orme*, 61 Ala., 263; *Crews v. Farmers Bank*, 31 Gratt. [Va.], 348; *Kline v. Raymond*, 70 Ind., 271; *Smith v. Lockridge*, 8 Bush [Ky.], 423; *Palmer v. Sargent*, 5 Neb., 223.)

Neither alterations nor erasures will be regarded when they are wholly unimportant, and the contract would be as valid without as with them. (*McKibben v. Newell*, 41 Ill., 461.)

Nor will the insertion of words in a writing be regarded when they are either entirely immaterial or only explanatory and do not alter the legal sense of the instrument. (*Krouskop v. Shontz*, 51 Wis., 204; *Robertson v. Hay*, 91 Pa. St., 242; *Gordon v. Sizer*, 39 Miss., 818; *Gardiner v. Harback*, 21 Ill., 129.)

Sawyer, Snell & Frost, contra, cited: *Savings Bank v. Shaffer*, 9 Neb., 1; *Coit v. Churchill*, 61 Ia., 296; *Cox v. Palmer*, 1 McCrary [U. S.], 433.

NORVAL, C. J.

Defendant in error filed a mechanic's lien against lots 15 and 16 in Richard's Addition to the city of Lincoln, claiming a balance due him in the sum of \$1,975, with interest thereon at seven per cent from August 25, 1890. Subsequently, suit was brought in the district court to foreclose said lien, and on February 28, 1891, during the pendency of the action, defendant in error, in consideration of the sum of \$1,500, sold said mechanic's lien to the plaintiff in error, and assigned the same to him by writing duly acknowledged. The suit to foreclose the mechanic's lien was prosecuted to decree on the 13th day of November, 1891, and the court found and determined that the sum of \$1,853.97, and no more, was due upon said lien, which was \$288.08 less than the amount claimed to be due in said lien so filed and assigned as above set forth. Afterwards this action was brought by the plaintiff in error to recover

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the said sum of \$288.08, with interest as damages for the breach of covenants contained in the following written assignment of said mechanic's lien:

"LINCOLN, NEB., February —, 1891.

"For value received I hereby set over and assign to Cyrus W. Fisherdict my mechanic's lien against lots fifteen (15) and sixteen (16) in Richards' subdivision to the city of Lincoln, and the Coffman building thereon, recorded at page 267, book of mechanics' lien records, and I hereby authorize my assignee to collect, receipt for, and discharge said lien, and covenant the full amount therein named is due, and said claim and lien is valid, and that there is no set-off or defense thereto or deductions therefrom; *and I will pay in cash any deductions made from said claim of \$1,975 in full amount of said deductions.*

"In presence of

A. H. HUTTON.

"J. H. McMURTRY."

The defendant interposes the defense that when he executed the assignment the words contained therein in italics, to-wit, "*and I will pay in cash any deductions made from said claim of \$1,975 in full amount of said deductions,*" were not contained in said written assignment, but have been since inserted without the knowledge or consent of the defendant. It is insisted by the plaintiff that the assignment has not been altered and changed, but was in precisely its present condition when signed and acknowledged by the defendant; and further, if the italicized words were interpolated after the execution of the instrument, as claimed by the defendant, the alteration was an immaterial one, and, therefore, the assignment is a valid and binding obligation.

At the trial the defendant testified that when he executed the assignment the words, "I will pay in cash any deductions made from said claim of \$1,975 in full amount of said deductions," were not written therein. If they had been he would have seen them, because he read the paper

over before attaching his signature; that he executed the assignment in McMurtry's office.

J. H. McMurtry testified that the defendant came to his office to sell the mechanic's lien, and that witness told him if he would guaranty the amount, as it was in suit, and Coffman, the owner of the premises, said it was not due him, that he would purchase the claim for his principal; that the witness took the assignment to his clerk, Mr. Cecil, who was in an adjoining room, and had him write in the italicized words, when he brought the paper back and presented it to the defendant, who then signed and acknowledged it.

Mr. Cecil was called as a witness for the plaintiff, who testified as follows:

Q. Do you remember the day Mr. Hutton was there to execute this assignment, in your office?

A. Well, I don't remember the day. I remember the circumstance.

Q. Whose writing is this in?

A. It is in my own.

Q. In whose writing are those last two lines above Hutton's signature?

A. In my own.

Q. State whether or not you wrote this other before or after the name of Mr. Hutton was signed.

A. It was written before his signature was attached to the paper.

Q. State the circumstances under which that was written, as you remember it.

A. I had prepared a number of these copies,—that is in blanks, this was before the signing of them,—and had them in a drawer, and Mr. McMurtry came in the office—I occupied the north room and he the south room for his private office—and got one of these blanks and took it into his office, and in a short time came out and asked me to write those lines in there. He dictated as I wrote.

Q. Then what did he do with the paper?

A. He took the paper back in his office, in his private office.

On cross-examination the witness testified that the disputed words were written in the assignment before the defendant's signature was attached.

It will be observed that the evidence bearing upon the question of the alteration of the assignment was conflicting. The veracity of the witnesses was for the jury to pass upon, and they having returned a verdict in favor of the defendant, we must regard as established that the assignment was altered after its execution, although the testimony of the greater number of witnesses is to the effect that the paper is in the same condition now as when it was signed and delivered.

Exceptions were taken by the plaintiff in the court below to the giving by the court on its own motion the following instructions:

"1. The main question of fact to be by you determined from the evidence in this case is whether or not in the written assignment to the plaintiff of A. H. Hutton's mechanic lien against the Coffman block these words, 'and I will pay in cash any deductions made from said claim of \$1,975 in full amount of said deductions,' were in said assignment before defendant A. H. Hutton signed and acknowledged the same.

"2. The law is that if a written instrument has been changed or altered in a material matter after its execution without the knowledge or consent of the person executing the instrument, such change or alteration so made renders such instrument nugatory and void.

"3. If you believe from the evidence in this case touching this matter that said words were written in said assignment after the same was executed by defendant Hutton, and so done without his knowledge or consent, then your verdict should be for the defendant.

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"4. If you believe from the evidence that said words were in said assignment prior to its execution by said Hutton, then your verdict should be in favor of the plaintiff for the difference between \$1,975, the face of the claim, and \$1,853.97, the amount found due said Hutton on said mechanic's lien by the decree of this court of date November 13, 1891, to which amount of difference you should add interest at the rate of seven per cent per annum from said 13th day of November, 1891; and if you so find, render your verdict for the amount of said deduction from the face of said lien with the interest thereon as directed."

The giving of each of these instructions is assigned as error in the motion for a new trial and in the petition in error. The second instruction is doubtless correct as an abstract proposition of law, for it has been more than once decided by this court that a material alteration of a written contract after its execution and delivery by one of the parties to the agreement, without the consent of the other, invalidates the instrument, and that no recovery can be had thereon. (*Brown v. Straw*, 6 Neb., 536; *Davis v. Henry*, 13 Neb., 497; *Walton Plow Co. v. Campbell*, 35 Neb., 173.) It is not every alteration of an instrument that will have that effect. If the change is immaterial, or unimportant—that is, one which does not vary the legal effect of the document, or change its terms and conditions—it will be disregarded. An alteration is regarded as immaterial which only expresses what the law implies. The authorities are uniform in support of the rule just stated. (2 Parsons, Contracts, [8th ed.], 720; *Burnham v. Ayer*, 35 N. H., 351; *State v. Dean*, 40 Mo., 464; *Western Building & Loan Association v. Fitzmaurice*, 7 Mo., App., 283; *Hunt v. Adams*, 6 Mass., 519; *Moote v. Scriven*, 33 Mich., 505; *Bridges v. Winters*, 42 Miss., 135; *McKibben v. Newell*, 41 Ill., 461; *Gardiner v. Harback*, 21 Ill., 129; *Krouskop v. Shontz*, 51 Wis., 204; *Gordan v. Sizer*, 39 Miss., 805.) Tested by the rule above stated, were the instructions quoted applicable

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to the case under consideration? The question was submitted to the jury for their determination, whether or not the words, "and I will pay in cash any deduction from said claim of \$1,975, in full amount of said deduction," were added to said assignment subsequent to its execution, and further, if they found that they were so inserted, without the defendant's consent or knowledge, the plaintiff could not recover. The question is, therefore, presented whether the addition of the words referred to constituted a material alteration, for if they did not, it is evident they did not affect the liability of the defendant, and hence the instructions should not have been given. If the added words were eliminated from the instrument, what would be the measure of the defendant's liability? As already stated, the sum claimed in the mechanic's lien assigned to the plaintiff was \$1,975, and interest thereon from the 25th day of August, 1890. The defendant did not guaranty the collection of the amount of the debt claimed to be due, on the lien, but, independent of the added words, he covenanted that the full amount therein named is due, and that there is no set-off or defense thereto or deductions therefrom. If the full amount of the claim had been correct and just, then the defendant would have incurred no liability by reason of the covenants contained in the assignment, whether the debt mentioned in the lien was uncollectible or not. But as there was a valid set-off against the claim, the defendant obligated himself to make good any and all deductions, by reason thereof. In other words, the measure of damages was the amount the claim was scaled down by the decree in the suit to foreclose the lien. It is insisted that the interpolated words limit the liability to the difference between the amount of the decree rendered and \$1,975. If this contention is well founded, then the defendant is released from all liability by reason of the alteration of the assignment, for an alteration of a written contract, which has the effect to decrease the liability of the obligee, is a material one, and

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vitiates the contract. (*Savings Bank v. Shaffer*, 9 Neb., 1.) The alteration of the assignment by the inserting of the words in question did not change the obligation of the defendant as it theretofore existed in any respect. He was still holden to pay the full amount of the deductions made from the claim. This is the plain import of the words added to the assignment after it was executed. It follows that the alteration was unimportant, and did not affect the liability of the defendant. Had the added words been entirely omitted the measure of plaintiff's recovery could have been no more, nor any less. Whether the alteration was material or not was a question for the court. (*Palmer v. Largent*, 5 Neb., 223.) The trial court therefore erred in submitting to the jury the question of the alteration of the assignment.

Complaint is made in the brief of the rulings of the court on the admission of the testimony, as well as the refusing of the instructions requested by the defendant; but the conclusion already reached makes it unnecessary to consider the assignments relating thereto. The judgment is reversed and cause remanded.

REVERSED AND REMANDED.

ALFRED ECKLUND, APPELLEE, V. ELIJAH J. WILLIS,
APPELLANT, ET AL.

FILED MARCH 5, 1895. No. 6397.

1. Confirmation of Sale. Objections to the confirmation of a sale of real estate must be specifically assigned in the motion filed in the lower court to vacate the sale, or they will be unavailing.
2. ———: APPRAISEMENT: ATTACK. The appraisal value of property made under an order of sale can be assailed only for fraud.
3. ———: ———. Objection that the property was appraised too

44	129
145	74
44	129
49	578
50	342
51	228
51	648
58	620
54	66
54	232
54	672
44	129
57	278
57	411
44	129
58	21
58	607
44	129
59	700
159	734
44	129
61	313
44	129
62	873
62	840

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high should be made and filed in the case with a motion to vacate the appraisement prior to the sale. (*Vought v. Foxworthy*, 38 Neb., 790 ; *Smith v. Foxworthy*, 39 Neb., 214.)

APPEAL from the district court of Lancaster county.
Heard below before TIBBETS, J.

B. F. Johnson and T. F. Barnes, for appellant.

Thomas C. Munger, contra.

NORVAL, C. J.

This is an appeal from an order of the district court overruling the objections of the defendant Elijah J. Willis, to the confirmation of the sale of real estate made under a decree of foreclosure, and in confirming said sale. The following are the grounds set up in defendant's motion to set aside the sale :

1. The appraisement is irregular.
2. The appraisement is not in accordance with the law governing sheriffs' sales.
3. The return of the sheriff shows that the appraisers were not sworn as provided by law.
4. The property was not appraised at its fair value, but at about one-half its true value, as shown by the affidavits on file in above case in support of motion to vacate order appointing a receiver.
5. The entire proceedings relative to said sale are irregular and not in accordance with the provisions of the law governing sheriffs' sales.

The cause was submitted to this court without either briefs or oral argument, hence we are not advised which of the several grounds urged against the confirmation in the court below the appellant now relies upon for a reversal of the cause.

It is obvious that the first, second, and fifth objections contained in said motion are too general and indefinite to

call for consideration. In what respect the appraisement and the proceedings leading up to the sale are irregular and not in accordance with the statute relating to judicial sales is not pointed out. Objections to the confirmation of a sale of real property must be specifically assigned in the lower court, or they will be unavailing. (*Johnson v. Bemis*, 7 Neb., 224.)

The third exception to the confirmation is not sustained by the record, since the return of the sheriff to the order of sale recites that the appraisers were sworn by him to impartially appraise the interest of the defendants in the mortgaged premises.

The remaining ground of the motion, namely, that the property was appraised too low, is not well taken for three reasons: First—Affidavits were filed in the court below in support of, and in opposition to, the motion, but they have not been embodied in a bill of exceptions. Therefore, we cannot review the evidence upon which the district court based its decision. (*Aultman v. Howe*, 10 Neb., 8; *Walker v. Lutz*, 14 Neb., 274; *Bradshaw v. State*, 17 Neb., 147; *Vindquest v. Perky*, 16 Neb., 284; *Maggard v. Van Duyn*, 36 Neb., 862.) Second—The objection as to the value fixed by the appraisers was not made until after the sale, which was too late. It should have been urged before the sale was made. (*Smith v. Foxworthy*, 39 Neb., 214; *Vought v. Foxworthy*, 38 Neb., 790.) Third—The fourth assignment of the motion is insufficient, since it is not charged that the appraisers, or any one connected with the case, acted fraudulently in making the appraisal. RAGAN, C., in the case last cited, in passing upon the same question here presented, says: "Appraisers of property about to be sold under execution act judicially, and the value fixed by them on property appraised can only be assailed for fraud. Inadequacy of the appraised value alone is not sufficient cause for setting aside a sale in the absence of fraud. To justify the vacation of a sale on the ground that the appraisement was

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too low, the actual value of the property must so greatly exceed its appraised value as to raise a presumption of fraud. All the affidavits filed in this case on the question of the value of the property were immaterial. There was no averment in the motion to set the sale aside of any fraudulent conduct on the part of the appraisers in making this appraisement; nor averment of any fraud or unfair means resorted to by the appraisers at the sale, or other party to the suit, conducing to the making of this appraisement. No facts were stated in the affidavits showing any fraudulent conduct on the part of any one in the making of the appraisement, nor can any such inference be drawn from the facts stated. The appraisement is assailed for error of judgment upon the part of the appraisers, and this furnishes no ground for setting the sale aside."

No error was committed in overruling the motion to vacate the sale in the case at bar, and the order appealed from is, therefore,

AFFIRMED.

PAUL STEIN ET AL. V. JOHN N. VANNICE ET AL.

FILED MARCH 5, 1895. No. 6060.

1. Instructions must be considered together and not by selection of detached paragraphs thereof.
2. ———: HARMLESS ERROR. A slight error in an instruction will not cause a reversal of the judgment, where it is manifest the party complaining was not prejudiced thereby.
3. An assignment of error for the overruling of a motion for new trial is bad, if it fails to specify to which of the several points set up in the motion the assignment applies. (*Glaze v. Parcel*, 40 Neb., 732.)
4. Bill of Exceptions: TIME OF SERVING: EXTENSION. It is

44	132
49	856
53	11
55	337
55	544

44	132
57	441
57	443

44	132
60	67

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not error to deny a motion for the extension of time for preparing and serving a bill of exceptions, where the party seeking such extension has not used due diligence in that behalf.

ERROR from the district court of Douglas county. Tried below before KEYSOR, J.

G. A. Rutherford and H. B. Holsman, for plaintiffs in error.

James B. Sheean and John H. Grossman, contra.

NORVAL, C. J.

This action was instituted in the court below by the defendants in error against Paul Stein, as constable, and Herman Busch and Thomas Price as sureties upon his official bond. There was a trial to a jury, with a verdict in favor of the plaintiffs below in the sum of \$310. The defendants filed a motion for a new trial, which was overruled by the court, and judgment was entered upon the verdict. The defendants prosecute error to this court. It appears from the pleadings in the case that in an action of forcible detention brought against the defendants in error before a justice of the peace a writ of restitution was placed in the hands of Paul Stein, as constable, for service; that in executing the writ and removing the said John and Carrie Vannice and their personal effects from the premises occupied by them it is alleged that said Stein, while under the influence of liquor, did carelessly, negligently, and willfully break and destroy the furniture and household goods belonging to the said Vannices. This suit is to recover the damages thereby sustained.

The petition in error contains three assignments. The first relates to the giving of the sixth paragraph of the instructions, which is in the following language:

"6. If you find for the plaintiffs under the evidence and instructions of the court, the measure of plaintiffs'

damages, if any, is the injury in dollars and cents which the preponderance shows occurred by reason of the plaintiff's (*sic*) negligent and careless handling and removal of plaintiffs' household goods."

The foregoing paragraph of the charge was not carefully or skillfully drawn, yet it is not believed that the jury could have been, or were, in the least misled. The trial judge in writing the instruction inadvertently used the word "plaintiff's" instead of "defendant's" before the word "negligent." It is a familiar rule that instructions must be considered together, and not by selections of detached paragraphs thereof. (*Blakeslee v. Ervin*, 40 Neb., 130; *Love v. Putnam*, 41 Neb., 86.) Reading this instruction in connection with the remainder of the charge, it is difficult to believe that the jury understood that the plaintiffs were entitled to recover damages from the defendants for their own negligence in handling their own goods. The writing of the word "plaintiff's" was a mere *lapsus calami*, and to hold that the defendants below were prejudiced thereby would cast an unmerited reflection upon the intelligence of the members of the jury. Had the defendants shown that the defendants in error, in a careless and negligent manner, broke their own furniture, the error in this instruction might have been prejudicial; but inasmuch as the evidence adduced on the trial is not embodied in a bill of exceptions, no prejudicial error is shown. The instruction is further complained of by reason of the use of the words "the injury in dollars and cents." The measure of plaintiffs' recovery was the difference in value of the property before and after the injury. It would have been better had the rule been so stated in the instruction, instead of in the language in which it was expressed; but no instruction was requested by the plaintiffs in error upon this point, hence the omission to so charge is not reversible error. (*German Nat. Bank of Hastings v. Leonard*, 40 Neb., 676; *Laing v. Nelson*, 40 Neb., 252.)

The second assignment of the petition in error is in this language: "The court erred in overruling the motion for a new trial." This assignment is too indefinite to be considered, since there are five separate and distinct grounds stated in the motion for a new trial. A petition in error, to be available, must assign alleged errors with particularity. The second assignment of error does not specify to which of the several points set up in the motion for a new trial the assignment applies, and is therefore bad. (*Glaze v. Parcel*, 40 Neb., 732.)

The remaining assignment of error relates to the overruling of the motion of the plaintiff in error Bush for additional time to prepare and serve a bill of exceptions in the case. This assignment is without merit. The cause was tried at the September, 1892, term of the district court, and on the overruling of the motion for a new trial at the same term the defendants were given forty days from the adjournment of the court *sine die* to reduce their exceptions to writing. No steps, however, were taken to that end by either of the defendants. During the following February term of the court a motion for additional time to prepare a bill of exceptions was presented to the court, which was overruled. The affidavit filed in support of the motion contains no showing of diligence, but, on the contrary, it appears that no effort was made by any of the defendants to obtain a bill of exceptions. It is only upon a showing of due diligence by the party seeking the settlement of a bill of exceptions that the court or judge is authorized to extend the time for such settlement after the expiration of the first forty days. (Code, sec. 311.) It follows that there was no error in denying the motion for an extension of time. The judgment is

AFFIRMED.

44	136
58	431

CONTINENTAL BUILDING & LOAN ASSOCIATION OF KANSAS CITY, MISSOURI, APPELLANT, V. WARD S. MILLS ET AL., APPELLEES.

FILED MARCH 5, 1895. No. 7478.

Appeal: FAILURE OF CLERK TO MAKE TRANSCRIPT: EFFECT.

Where a party free from fault or laches is prevented from having his appeal docketed in the appellate court within the statutory period solely through the neglect or failure of the proper officer to prepare the transcript of the proceedings, the law will not permit him thereby to be deprived of his appeal.

MOTION by appellees to dismiss appeal from a decree of the district court of Lancaster county on the ground that the cause was not docketed in the supreme court within six months from rendition of judgment. Appellant resisted the motion on the ground that the delay in docketing the appeal resulted solely from the failure of the clerk below to prepare a transcript. *Motion overruled.*

Mockett, Rainbolt & Polk, for the motion.

Stevens, Love & Cochran, contra.

NORVAL, C. J.

This was an action to foreclose a real estate mortgage. One of the defenses was that the loan was tainted with the vice of usury. The issues were tried on June 30, 1894. The defense of usury was sustained and a decree of foreclosure was entered. The plaintiff appeals, the transcript being filed in this court January 16, 1895. The cause is submitted upon the motion of the appellees to dismiss the appeal, for the reason the same was not docketed in this court within six months after the entry of the decree.

The statute governing appeals to this court in actions in equity (section 675 of the Code) provides: "The party ap-

pealing shall, within six months after the date of the rendition of the judgment or decree, or the making of the final order, procure from the clerk of the district court and file in the office of the clerk of the supreme court a certified transcript of the proceedings had in the cause in the district court, * * * and have the said cause properly docketed in the supreme court; and on failing thereof, the judgment or decree rendered or final order made in the district court shall stand and be proceeded in as if no appeal had been taken." It is the established doctrine in this, as well as other states, that the provision of a statute limiting the time within which appeals must be taken is jurisdictional in its nature, and that the courts cannot ordinarily enlarge or extend the time for perfecting an appeal. (*Verges v. Roush*, 1 Neb., 113; *Glore v. Hare*, 4 Neb., 131; *Gifford v. Republican V. & K. R. Co.*, 20 Neb., 538; *Lincoln Brick & Tile Works v. Hall*, 27 Neb., 874; *Miller v. Camp*, 28 Neb., 412; *Fitzgerald v. Brandt*, 36 Neb., 683; *Omaha Loan & Trust Co. v. Ayer*, 38 Neb., 891; *Moore v. Waterman*, 40 Neb., 498; *Record v. Butters*, 42 Neb., 786.)

In the case at bar the evidence introduced on the hearing of the motion conclusively shows that counsel for appellant, on the 13th day of December, 1894, requested the clerk of the district court to prepare a transcript of the proceedings in the case, for the purpose of taking an appeal, notifying him at the time that it must be completed so that it could be filed in this court during said month; that the clerk promised to comply with said request and then directed one of the employes in his office to prepare it; but owing to the press of other business he failed and neglected to make the transcript until after the expiration of six months from the date of the decree, although it could have been prepared in less than two days after it was ordered; that an attorney for appellants called again upon the clerk of the district court on December 30, and demanded the transcript, and was informed that the order for the same

had been overlooked. It also appears that appellant has not been guilty of any laches, but as soon as the transcript was completed it was filed in this court, and also that the appeal has not been taken for delay.

The proposition presented for our consideration is whether, in the light of the adjudications in this state cited above, a party who, without any fault or negligence on his part, is prevented by the act or neglect of the clerk of the trial court from perfecting an appeal within the time limited by law, can be relieved by the court from the operation of the statute? In other words, must the provision of the law fixing the time for taking appeals be enforced in all cases as it is written, even though the delay is caused alone by the neglect and omission of the clerk of the trial court to make in proper time a transcript of the record? We do not think that the decisions already mentioned are decisive of the question, or if adhered to would deprive the plaintiff in this case of an appeal. In each of the cases to which reference has been made the appellant was not diligent in prosecuting his appeal, and the delay in docketing the same was not attributable to any action or want of action on the part of the appellees, or the trial court, or any officer thereof; but that the failure to file the appeal in the time limited by statute was the appellant's fault. Doubtless, the court cannot aid a party in fault or relieve him of the consequences of his own negligence. *Gifford v. Republican V. & K. R. Co.*, *Miller v. Camp*, *Lincoln Brick & Tile Works v. Hall*, *Fitzgerald v. Brandt*, and *Omaha Loan & Trust Co. v. Ayer*, *supra*, expressly recognize the principle that a party will not be deprived of an appeal when it clearly appears that the failure to perfect the same in time is not attributable to his own laches or negligence, but is occasioned by the default of the trial court or its officers. Thus, in *Lincoln Brick & Tile Works v. Hall*, *supra*, the court, in construing section 1011 of the Code governing appeals from judgments before justices of

the peace, uses this language: "No doubt where due diligence is shown in demanding a transcript, and from any cause the trial court delays the delivery of the same for so long a time that it will be impossible to file it within the thirty days, the court will relieve the appellant, because the fault is with the court." Judge Elliott, in his valuable work on Appellate Procedure, at section 112, uses this language: "The rule that the court cannot enlarge the time for taking an appeal must be regarded as established, but the court may, nevertheless, relieve a party in the proper case against fraud or accident. In relieving a party against fraud or accident the court does not extend the time for taking the appeal by breaking down the provisions of the statute limiting the time within which appeals must be taken. The principle applied is a familiar one, for it is very often applied to the statute of frauds and to the general statute of limitations. The fraud of a party will prevent him from taking advantage of either of the statutes named, and so it will in cases where the statute limits the time for taking appeals." And the learned author at section 117 observes: "It is said in general terms by the authorities to which we have referred, and by many more, that the time for taking an appeal cannot be extended by agreement or by order of the court, but, as we have shown, this rule, general and firmly settled as it is, does not always preclude an appeal, and to the instances upon which it does not fully operate we add another of a different nature. Where the time is lost without the fault of the party, and solely by reason of the action or non-action of the court, the statute does not operate, because the loss of time is not attributable to the acts of the parties. The rule that the delay or wrong of the court shall not prejudice a party rests upon the maxim, 'An act of the court shall prejudice no man.' Where, however, the fault of the party concurs with that of the court, the maxim will not prevail to save an appeal not taken within the time fixed by law." The

text is sustained by the decisions of the courts of other states. (*Fox v. Fields*, 12 Heisk. [Tenn.], 31; *Craddick v. Pritchett*, Peck [Tenn.], 17; *Holt v. Edmondson*, 31 Ga., 357; *Moyer v. Strahl*, 10 Wis., 74; *Laymance v. Laymance*, 15 Lea [Tenn.], 476; *Smythe v. Boswell*, 117 Ind., 365.)

The general doctrine above stated has been asserted and enforced in this court more than once. In *Dobson v. Dobson*, 7 Neb., 296, a party was prevented from taking his appeal in time by reason of the absence of the county judge from the county, before whom the cause was heard. Upon the return of the judge the transcript was made out and filed in the district court, and on motion of the appellee the appeal was dismissed for the reason the same was not taken within the time required by statute. This court reinstated the appeal. In the syllabus it is stated: "Where a party has been prevented from complying with the legal requisites to obtain an appeal, by the default or absence of the justice or judge of the court in which the cause is pending, and not by any default or laches on his part, the appeal may be taken and perfected after the expiration of the time limited by statute, and such appeal must be treated in the appellate court as though it had been taken within the time prescribed by law."

Republican V. R. Co. v. McPherson, 12 Neb., 480, is quite in point. There certain real estate has been condemned by the railroad company for its right of way and the damages sustained by reason thereof were assessed by the commissioners appointed by the county judge for that purpose. At various times within sixty days after the filing of the award of the commissioners with the county judge the land-owner notified said judge of her intention to prosecute an appeal to the district court, and she tendered him the fees and demanded a transcript of the proceedings, but the county judge neglected and refused to furnish such transcript until after the expiration of the sixty days limited

by law for perfecting the appeal. As soon as the transcript was procured it was filed with the clerk of the district court. The appeal was dismissed for the reason that it was not filed in time, and subsequently it was reinstated by the district court. On review of the case, this court said: "The petition and affidavits show diligence on the part of the appellant, and that she made every effort to perfect the appeal within the time limited by statute, but was prevented by the negligence, or failure to perform his duty, of the county judge. The case therefore falls within the rule laid down in *Dobson v. Dobson*, 7 Neb., 296, and is sufficient to entitle the party to an appeal."

In *Parker v. Kuhn*, 19 Neb., 396, it is said: "It is a well established rule that where an individual in the prosecution of a right does every thing which the law requires him to do, and he fails to attain his right by the neglect or misconduct of a public officer, the law will protect him."

The case of *Cheney v. Buckmaster*, 29 Neb., 420, was this: On September 4, 1888, judgment was rendered against the plaintiffs in error in the county court, and within four days thereafter they filed an appeal bond, which was approved, and demanded a transcript for the purpose of taking an appeal. The judge failed and neglected to make out a transcript until October 11, on which date it was filed in the district court, and the appeal was docketed. The failure to perfect the appeal in proper time was without any fault of the appellants, but was caused solely by the failure of the judge to prepare the transcript. The district court, on motion of the appellee, dismissed the appeal on the ground that it was not filed in the district court within thirty days after the rendition of the judgment. This court held that the appeal was erroneously dismissed, and reinstated it. To the same effect is *Omaha Coal, Coke & Lime Co. v. Fay*, 37 Neb., 68, the first paragraph of the syllabus of the opinion in which case is as follows: "A defeated party to an action in the county court, who promptly

orders a transcript of the proceedings to be prepared for the purpose of appealing the case, will not be denied the right of appeal because the county judge fails to prepare the transcript within thirty days after the rendition of judgment."

The same principle running through the above cases was recognized in *Bickel v. Dutcher*, 35 Neb., 761. It was there decided, overruling *Horn v. Miller*, 20 Neb., 98, that the time within which an appeal may be taken from the district court to this court begins to run when the clerk spreads the decree upon the court journal, and not from the announcement of the decision by the court.

A party who has not been negligent cannot be deprived of an appeal to this court either by the failure or refusal of the clerk to enter the decree upon the records of the court within six months after it was pronounced, or for the neglect of such clerk to make a transcript of the proceedings in proper time. The record in this case discloses that the omission to docket the appeal in this court within the statutory period was not through any fault of the appellant, but was caused solely by the neglect of the clerk of the district court to prepare and deliver to it a transcript of the proceedings when demanded. The law will not permit appellant to be deprived of its appeal. In so holding we do not extend the time fixed by law for taking an appeal, but merely declare that the statute does not operate to the appellant's prejudice, since the loss of time is not attributable to its acts, but is chargeable solely to the neglect or non-action of a public officer whose duty it was to make the transcript. The motion to dismiss the appeal is overruled.

MOTION OVERRULED.

CHRISTIAN LIHS V. AUGUST LIHS.

44	143
54	433
44	143
61	415

FILED MARCH 5, 1895. No. 6057.

1. Witnesses: HUSBAND AND WIFE: CANCELLATION OF DEED.

Under the statutes of this state a wife cannot be examined as a witness against her husband, over his objection, in a suit brought by the latter against his son to obtain the rescission^d of a deed alleged to have been executed by the father to the son upon a condition subsequent.

2. Trial to Court: ADMISSION OF INCOMPETENT TESTIMONY:

HARMLESS ERROR. The admission of the testimony of a disqualified witness, over objections and exceptions, in a trial to the court without the intervention of a jury, is not sufficient ground for reversal, if sufficient material and competent evidence was admitted to support the finding and judgment.

3. Review: CONFLICTING EVIDENCE. Where the evidence is conflicting, but sufficient competent evidence is in the record to support the finding, the judgment will not be set aside by a reviewing court.

ERROR from the district court of Cedar county. Tried below before NORRIS, J.

Wilbur F. Bryant, for plaintiff in error.

NORVAL, C. J.

This was a suit by Christian Lihs against August Lihs and Ernestine Lihs to procure the rescission of a conveyance of one hundred and sixty acres of land in Cedar county, theretofore alleged to have been executed by the plaintiff to August Lihs upon a condition subsequent. The amended petition alleges, in substance, that on the 19th day of December, 1882, plaintiff was the owner in fee of the land in dispute, and occupied the same, together with his wife, the said Ernestine, his son, the said August, and an unmarried daughter, as a homestead; that on said date the plaintiff and his said wife conveyed to the defendant,

August Lihs, said premises by deed of general warranty in consideration that the plaintiff, his wife, his unmarried daughter, and his said son should remain upon said premises, and occupy the same as a home, and that said August should support and maintain plaintiff and his wife during their natural lives; that the defendant, August Lihs, on the 19th day of July, 1887, combining and confederating with his mother, and without any valid excuse or provocation, drove the plaintiff from the premises, and ordered him never to return, and since said time said August has refused the plaintiff a home and shelter upon said premises and refuses him support and maintenance, although the plaintiff, by reason of his being aged and infirm, is unable to support himself. The prayer for relief is as follows: "Wherefore the plaintiff prays that the defendant, August Lihs, be required to reconvey the said premises to the said plaintiff, and that the title to the same may be confirmed in the said plaintiff and quieted in him, and for such other and further relief as justice and equity may require." The defendant, August Lihs, for answer, admitted plaintiff was the owner of the land and conveyed the same by deed of general warranty to August, and denied all other allegations contained in the amended petition. For further answer it is alleged "that neither this defendant nor any person authorized by him or the plaintiff ever made, entered into, or signed any contract, agreement, or memorandum thereof, in writing for the sale of said premises or any part thereof, other than the deed aforesaid; that said deed was made upon a good and valuable consideration, but was made on the part of said plaintiff with the intention to defraud, hinder, and delay creditors of the plaintiff and persons about to become creditors of the plaintiff." Plaintiff replied by a general denial. The defendant Ernestine Lihs demurred to the amended petition, which was sustained by the court, and the plaintiff having elected to stand upon his pleading, the court dismissed the action as

to the defendant Ernestine. The cause proceeded to trial against the son alone, and the court found the issues joined against the plaintiff, and dismissed the bill. A motion for a new trial was overruled, to which an exception was taken by the plaintiff, and he prosecutes error to this court.

After the plaintiff had introduced his proof the defendant called Ernestine Lihs, the wife of the plaintiff, as a witness in his behalf, and she was sworn, and testified in effect that at and prior to the time the deed was executed by herself and husband, there was no agreement or contract entered into whereby August covenanted to support and maintain the plaintiff and his wife so long as they should live, or that they were to remain upon the farm; that the plaintiff had shot and injured Mr. Lentz' boy; that a suit for damages against the plaintiff was, by reason thereof, anticipated, and that was the inducement for making the deed. Counsel for the plaintiff objected at the time to Mrs. Lihs testifying, on the ground that she is incompetent to testify against her husband, which objection was overruled by the court, and an exception was taken to the decision. This is the sole error relied upon for reversal of the judgment.

Section 331 of the Code of Civil Procedure declares: "The husband can in no case be a witness against the wife, nor the wife against the husband, except in a criminal proceeding for a crime committed by one against the other, but they may in all criminal prosecutions be witnesses for each other."

The foregoing provision was under consideration in *Niland v. Kalish*, 37 Neb., 47, and *Greene v. Greene*, 42 Neb., 634. The first case was an action by the creditors of Solomon Kalish to set aside conveyances claimed to have been fraudulently made by him to his wife. It was held that it was incompetent for Mrs. Kalish to testify against her husband, without his consent, as to facts tending to show the transfer was voluntary and fraudulent as to the creditors of

the husband. The second case was an action by a husband against the wife for the specific performance of a contract for the conveyance of real estate. It was ruled that the statute above quoted prohibited the husband from being examined as a witness against his wife over her objection. In the case at bar the wife was not called as a witness by the husband, but her testimony was against him, and, therefore, under the statute and the decisions mentioned above was clearly incompetent, and should have been excluded. True, she was not, at the time of the trial, a party to the record, but that does not change the rule. That fact is a stronger reason, it seems to us, why her testimony should not have been received. Section 328 of the Civil Code provides: "Every human being of sufficient capacity to understand the obligation of an oath, is a competent witness in all cases, civil and criminal, except as otherwise herein declared. The following persons shall be incompetent to testify. * * * Third—Husband and wife, concerning any communication made by one to the other during marriage, whether called as a witness while that relation subsisted or afterwards," etc. Section 332 declares: "Neither husband nor wife can be examined in any case as to any communication made by the one to the other while married, nor shall they, after the marriage relation ceases, be permitted to reveal in testimony, any such communication made while the marriage subsisted." It is too plain to admit of argument that neither husband nor wife can give testimony relating to communications between them, nor can either the husband or wife testify, one against the other, in a case like the one at bar.

It only remains to be determined whether the judgment should be reversed for the error committed by the district court in permitting Mrs. Lihs to testify in the case. This court has repeatedly said that a cause tried to the court without the intervention of a jury will not be reversed for the admission of incompetent or irrelevant testimony alone.

(*Enyeart v. Davis*, 17 Neb., 228; *McConahey v. McConahey*, 21 Neb., 463; *Willard v. Foster*, 24 Neb., 213; *Sharmer v. Johnson*, 43 Neb., 509; *Stabler v. Gund*, 35 Neb., 648; *Tower v. Fetz*, 26 Neb., 710; *Ward v. Parlin*, 30 Neb., 376; *Dewey v. Allgire*, 37 Neb., 6; *Liverpool & London & Globe Ins. Co. v. Buckstaff*, 38 Neb., 146; *Courcamp v. Weber*, 39 Neb., 538; *Whipple v. Fowler*, 41 Neb., 675.) The rule in this state is that where the record discloses sufficient legal and competent evidence to sustain the finding, the judgment in a case where there was a trial without a jury will not be disturbed on the ground that the court admitted, over the objection of the party complaining, immaterial or incompetent evidence. (*Richardson v. Doty*, 25 Neb., 420; *Bilby v. Townsend*, 29 Neb., 220; *Commercial Nat. Bank of St. Paul v. Brill*, 37 Neb., 626.) The same rule prevails where an incompetent witness is permitted to testify, over proper objections and exceptions, in a cause where a jury is waived. The admission of the testimony of such a witness will not of itself work a reversal, but this court on a review of the cause will disregard such testimony in passing upon the question whether the evidence supports the findings of the trial court, and if found that the judgment is not sustained by sufficient competent evidence, it will be set aside. (*Commercial Nat. Bank v. Brill*, *supra*.) The defendant, August Lihs, and Ella Dycus, the married daughter of the plaintiff, each testified that there was no agreement or understanding to the effect that August should support his father in consideration of the conveying of the land to the son, but that the deed was made for the sole purpose of preventing the farm from being taken by Mr. Lentz, in case he should obtain a judgment for damages against the plaintiff herein, for shooting Mr. Lentz' boy. The plaintiff while upon the witness stand admitted that he executed the deed for that purpose. The evidence bearing upon the question whether the conveyance was made upon the condition that the son should

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support his father, that the latter should remain upon the land, and that he was driven off by the defendant, is conflicting. Yet, disregarding the testimony of Mrs. Lihs, as we must, still there was sufficient proof in the record upon which to base a finding for the defendant. The judgment is, therefore,

AFFIRMED.

NATIONAL CORDAGE COMPANY V. ALEXANDER SIMS
ET AL.

FILED MARCH 5, 1895. No. 6317.

1. **Conditional Sales: RECORD.** The design of the provision of section 26, chapter 32, Compiled Statutes, requiring conditional sales of personal property to be in writing and filed with the county clerk in order to be valid as against purchasers and judgment creditors, is to notify third persons, who might otherwise be defrauded, that the title thereof remains in the vendor.
2. ———: ———. Said provision has no application where the relation of vendor and vendee does not exist.
3. **Agency.** Where a contract provides for the consignment of goods to be sold on commission for prices fixed by the consignor and returns at stated periods, the consignee guarantying payment thereof, the relation which the law implies is that of an agency for sale upon a *del credere* commission; and not that of vendor and vendee.
4. ———: **FACTORS AND BROKERS.** The relation of a factor for the sale of goods is that of a trustee for his principal with respect to the property entrusted to him.
5. ———: ———. Property in the possession of a factor to be sold for the benefit of his principal is not liable to execution or attachment in satisfaction of the debts of the former.
6. ———: **CONSTRUCTION.** Agreement, set out in the opinion, *held*, not a conditional sale but to create a *del credere* agency only.

ERROR from the district court of Cuming county. Tried below before NORRIS, J.

44	148
48	402
44	148
51	506
54	510
44	148
57	153

Uriah Bruner, for plaintiff in error.

T. M. Franse and *P. M. Moodie*, *contra*, cited, contending that the property was subject to attachment as Yoder's: *Forrest v. Nelson*, 108 Pa. St., 481; *Peck v. Heim*, 17 Atl. Rep., [Pa.], 984; *Carleton v. Sumner*, 4 Pick. [Mass.], 516; *Dresser Mfg. Co. v. Waterston*, 3 Met. [Mass.], 18; *Mixer v. Cook*, 31 Me., 340; *Bowen v. Burk*, 13 Pa. St., 146; *Scudder v. Bradbury*, 106 Mass., 427; *Barry v. Palmer*, 19 Me., 303; *Fuller v. Bean*, 34 N. H., 290, 303.

Post, J.

This was an action of replevin in the district court for Cuming county, by which the plaintiff below, plaintiff in error, the National Cordage Company, sought to recover possession of 9,100 pounds of binder twine. The facts essential to an understanding of the questions presented for determination are as follows: On the 7th day of June, 1891, the plaintiff appointed one B. Y. Yoder agent for the sale on commission of its binder twine at West Point, in said county. During the season of 1891 about 20,000 pounds of twine were consigned by the plaintiff to Yoder for sale under the terms and conditions of his agency, and the property now in controversy is the portion thereof undisposed of at the close of that season. The several defendants claim through an order of attachment issued by A. Briggs, a justice of the peace for Cuming county, in an action by L. E. Chubbuck as plaintiff and against B. Y. Yoder as defendant. The appointment above mentioned is in writing and is here set out:

"The National Cordage Co. of New York City and Chicago, Ill. (a corporation organized under the laws of the state of New Jersey), does hereby appoint B. Y. Yoder to be its agent at West Point, in the county of Cuming, state of Nebraska, for the sale of binder twine for and dur-

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ing the season of 1891 only. And said agent hereby contracts and agrees to do and perform as follows:

“1st. To keep on hand, in proper season, whatever twine may be required at West Point aforesaid, during said season, and to sell or be interested in the selling of no twine whatever except that obtained from The National Cordage Co. so long as the said company can furnish the same.

“Non-compliance by said agent with these provisions, forfeits all commission or remuneration for services rendered which may be or may become due said agent under this contract, in addition to such damages as may be allowed by law.

“2d. All such twine shall be sold for cash on delivery, at the following prices, and said agent hereby orders shipment to be made by The National Cordage Co. at once:

5,000 lbs. sisal binder twine, at 11 cts. per lb. gross weight.

6,000 lbs. S. D. manilla binder twine, at 13½ cts. per lb. gross weight.

6,000 lbs. pure manilla binder twine, at 14½ cts. per lb. gross weight.

And said agent shall pay all freight and transportation charges from Omaha on all twine ordered under this contract.

“3d. All money received by said agent, accruing from the sale of such twine, shall be and shall remain the property of said The National Cordage Co., and all such twine shall be and remain the property of said The National Cordage Co., until sold pursuant to the terms and conditions of this contract.

“4th. Said agent shall promptly remit to The National Cordage Co., at Chicago, Ill., on the first day of each month, and whenever requested at other times, all moneys received for twine sold under this contract, and shall make no deduction therefrom, and have no lien or interest on, in, or to any money so received. And a failure to so remit shall not be waived by any person whomsoever, nor shall a de-

mand therefor be necessary, or a failure to demand be construed as a waiver of this condition.

"5th. No twine shall be delivered by said agent to any person or persons, or corporation, except upon a *bona fide* sale of the same for cash.

"6th. If any twine ordered by said agent under this contract shall remain on hand in original packages at the close of the season, to-wit, on Sept. 1st, 1891, said agent shall keep said twine safely stored in some dry and secure place until August 1, 1892, and shall keep the same continually insured in some responsible insurance companies, in the name of The National Cordage Co., to the amount of invoice price, at all times subject to the order of The National Cordage Co., free of charge for storage, insurance, or local taxes, and shall have no claim against said The National Cordage Co. for freight and transportation charges paid by said agent on such twine, and shall deliver the same at the nearest railroad depot without charge, on demand.

"7th. In consideration of the faithful performance of all the above conditions, The National Cordage Co. hereby agrees to use its best endeavors to supply all twine ordered during said season by said agent, and to pay said agent as his commission, in cash, at settlement, on or after Sept. 1st, 1891, a sum equal to 2½ cents per pound for all twine sold in conformity with this contract.

"8th. But if the said agent sells and settles for all twine received by him, in cash, and the money is received by said The National Cordage Co., in Chicago, on or before Nov. 1, 1891, a further commission of ¼ cent per pound is to be paid said agent; otherwise this provision to be void and of no effect.

"9th. The said agent agrees, at his own expense, to insure all twine immediately upon its receipt by him, to the amount of invoice price, in responsible insurance companies in the name of The National Cordage Co., and to keep the same continually insured, while said twine remains in his possession.

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"10th. It is mutually agreed by the parties hereto that this contract cannot be changed in any of its provisions by any one in the employment of The National Cordage Co., nor will any promises or agreements, either written or verbal, be binding upon the said The National Cordage Co., until approved by one of its officers or manager.

"Dated at West Point this 7th day of July, A. D., 1891.

"THE NATIONAL CORDAGE CO.,

"By H. W. VAN SICKEL,

"Special Agent.

"B. Y. YODER.

"Approved: THE NATIONAL CORDAGE CO.,

"By B. TIMMEM."

On the 13th day of October, 1891, Mr. Van Sickel, the plaintiff's agent, visited West Point, when an invoice was taken, showing twine on hand as follows: sisal, 5,250 pounds; S. D., 3750 pounds; manilla, 100 pounds; total, 9,100 pounds. On the 1st day of November following Yoder settled for the twine sold, giving in part payment therefor two notes of \$400 each, signed by Joseph Faunigle, and which at the date of the trial of this cause were still unpaid. Reference is here made to the Faunigle notes for the reason that they are claimed by defendants to have been received in satisfaction for the twine in controversy, from which it is argued that the title to said property thereby passed to Yoder and that it was accordingly liable to be attached on process against him; but for that contention we can perceive no foundation in the record. It is clearly established by the undisputed evidence of Van Sickel, as well as by the statement of the account with Yoder, that the consideration for said notes was the twine sold, and not that on hand at the date of settlement. But the real controversy is with respect to the character of the transaction between Yoder and the plaintiff company. It is strenuously insisted by the defendant that the evidence discloses a mere conditional sale of the twine, which, not hav-

ing been filed in the office of the county clerk in accordance with the provisions of section 26, chapter 32, Compiled Statutes, must be held void as against attaching creditors. The distinction between conditional sales and consignments of personal property is frequently overlooked by text-writers as well as judges. Perhaps no sounder definition of a conditional sale is to be found in the books than that approved by Mr. Newmark in his valuable work on the Law of Sales, section 19: "Whenever it appears from the contract between the parties that the owner of personal property has transferred the possession thereof to another, reserving to himself the naked title thereof, solely for the purpose of securing payment of the price agreed upon between them, the contract is necessarily a conditional sale and not a bailment." Such an agreement is obviously within the provisions of our registration laws, and must be filed in order to protect the seller against purchasers and execution creditors without notice of the vendee in possession. The manifest purpose of the statute in providing for the filing of the contract is to notify third parties that the title of the property remains in the vendor, and to thus protect persons who might otherwise be defrauded. (*Dyer v. Thorstad*, 35 Minn., 534.) And that it contemplates cases only in which the relation of vendor and vendee exists,—that is, where the title to the property involved is intended to pass from one party to the other upon the performance of the conditions named,—is apparent from the act itself. The law implies a mere consignment of goods for sale upon a *del credere* commission, and not a sale thereof where the contract provides that the consignee shall receive them and return periodically to the consignor the proceeds of sales at prices charged by the latter, the consignee guaranteeing payment therefor. (*Mechem, Agency*, 14, 986a; *Newmark, Sales*, 25; *McClelland v. Scroggin*, 35 Neb., 536, and cases cited.) There is in the contract here involved no suggestion whatever of the relation of vendor and vendee,

or of facts from which Yoder could acquire title to the twine in controversy upon the happening of contingencies near or remote. He was, in short, what the contract implies, a mere factor holding the property on consignment for the benefit of his principal. As a factor, his relation was that of a trustee for the plaintiff with respect to the twine in his possession. It follows that said property was not subject to execution or attachment in satisfaction of his debts, and that in allowing the defendants below to recover the district court erred, for which the judgment must be reversed and the cause remanded for further proceedings therein not inconsistent with this opinion.

REVERSED AND REMANDED.

44	154
45	566

44	154
48	581
48	687

44	154
49	342
51	376
55	740

44	154
62	510
62	511

STATE OF NEBRASKA, EX REL. CHARLES HAMMOND, V.
F. N. DIMOND ET AL.

FILED MARCH 5, 1895. No. 7500.

1. **Villages: INCORPORATION.** The provision of section 40, chapter 14, Compiled Statutes, for the incorporation of villages, "Whenever a majority of the taxable inhabitants of any town or village not heretofore incorporated under the laws of this state shall present a petition to the county board," etc., applies to villages in the ordinary and popular sense of the term, and was not intended to clothe large rural districts with extended municipal powers, or subject them to special taxation for purposes to which they are in nowise adapted.
2. ———: ———: **OUTSIDE TERRITORY.** Lands adjacent to a town or village may be incorporated therewith, provided they are in such close proximity thereto as to be suburban in character and have some unity of interest with the platted portion in the maintenance of municipal government. But the statute does not contemplate the incorporation of remote territory having no natural connection with the village and no adaptability to municipal purposes. (*State v. Village of Minnetonka*, 59 N. W. Rep. [Minn.], 972.)

State v. Dimond.

3. ———: ———: DETACHMENT OF TERRITORY. The provision of section 101, chapter 14, Compiled Statutes, for the disconnecting of territory from a city or village by petition, is available only to legal voters of the territory sought to be detached.
4. ———: ———: QUO WARRANTO: PARTIES. The owner of agricultural lands illegally included within the boundaries of a city or village who is not a voter therein, may maintain proceedings by *quo warranto* for the purpose of determining the validity of the act of incorporation.
5. ———: ———: USER. The effect of a continued user of corporate powers in such a case not presented by the record and not determined.

ERROR from the district court of Lancaster county.
Tried below before STRODE, J.

D. F. Osgood, for plaintiff in error.

Morning & Berge, contra.

POST, J.

This was a proceeding in the nature of a writ of *quo warranto* in the district court for Lancaster county. The object of the proceeding was to test the legality of the alleged incorporation of the city, formerly the village, of College View, in said county. A general demurrer to the petition was sustained, and final judgment having been entered thereon, the cause was removed into this court for review upon the petition in error of the relator. The only question presented being the sufficiency of the petition to entitle the relator to relief, it is deemed proper to here copy it at length, omitting caption and conclusion, viz. :

"1. The relator is the owner of the northwest quarter of the southeast quarter of section six (6), township nine (9) north, of range seven (7) east, in Lancaster county, Nebraska, and has been the owner of said land ever since the 15th day of February, 1887, which has ever since said time been farm land and used as such.

"2. The defendants, F. N. Dimond, C. W. Nicola, Joseph

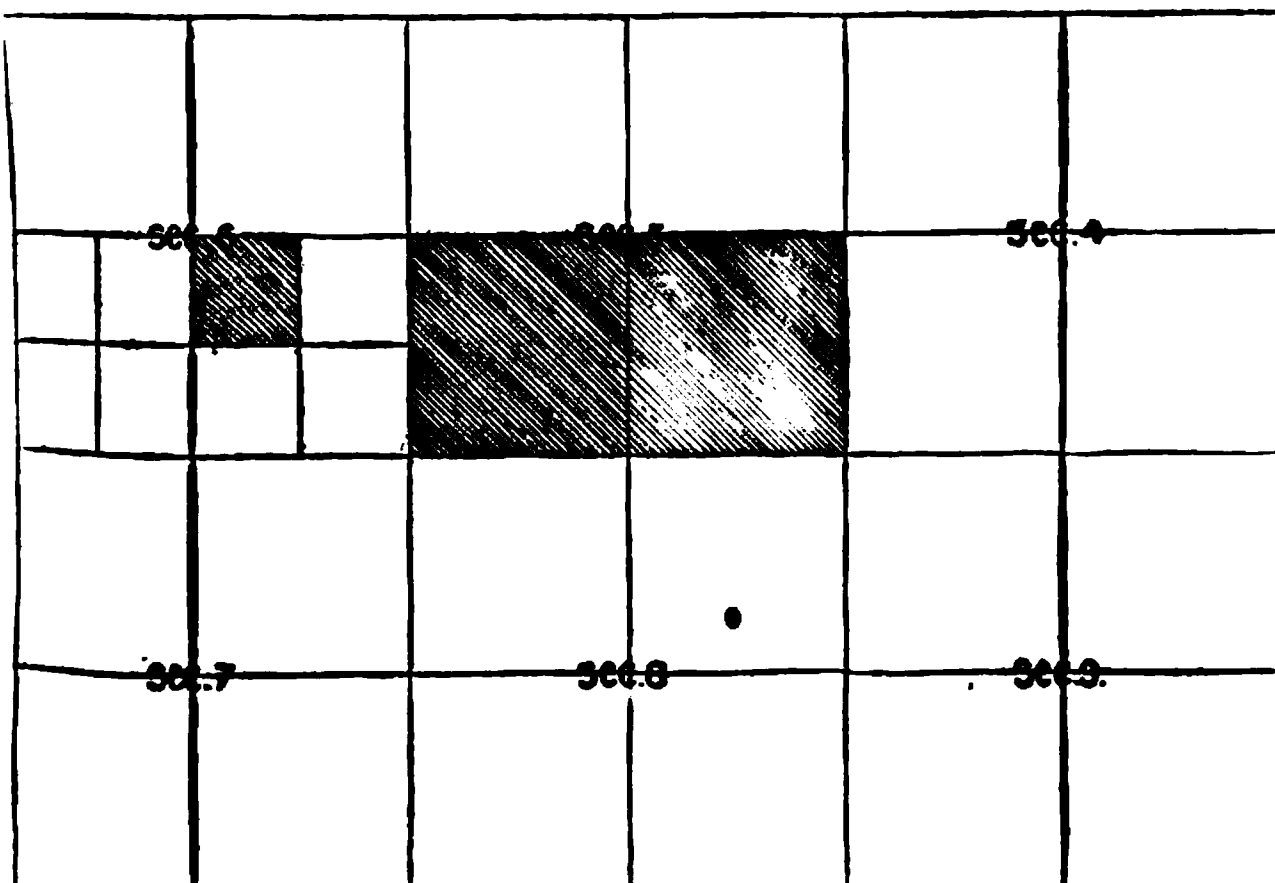
Sutherland, J. A. Childs, L. F. Soucey, F. A. De Wolf and Josephus Hobbs, representing and acting as mayor and council for the defendant, the city of College View, are without authority of law exercising and usurping the rights and duties of mayor and council of the city of College View, county of Lancaster and state of Nebraska, and are passing ordinances and levying taxes without legal authority therefor.

“3. Your relator alleges the fact to be that there is no such incorporated city or municipality as the city of College View.

“4. Your relator alleges that the following tract or parcel of land in section 5, township 9 north, of range 7 east, to-wit, the southwest quarter and the south half of the southeast quarter and the north half of the southeast quarter of section 5, township 9, range 7 east, Lancaster county, Nebraska, was platted as College View; that afterwards, to-wit, on the 25th day of April, 1892, two-thirds of the residents of the platted tract of College View and the other land hereafter described, presented to the county commissioners of Lancaster county, Nebraska, a petition for the incorporation of the village of College View, but said petition described the territory intended to be incorporated in said village, which was as follows: the west one-half of sections 4 and 9, all of sections 5 and 8, and the east one-half of sections 6 and 7 in township 9 north, of range 7 east, of the 6th principal meridian, Lancaster county, Nebraska, containing four sections of land, which include the land above described owned by your relator, together with about 2,240 acres of other land, which was used for farming purposes and was not platted as an addition or subdivison, nor were there any residents upon the land above described owned by your relator, nor was there land platted or occupied for one half mile or more between the above described land of your relator and of the platted land or tract named College View. And the said commissioners of Lancaster county, Nebraska, acting without authority of law, did, on

the 28th day of April, 1892, pretend to incorporate the village of College View, including within the metes and bounds in said pretended incorporation the land of your relator above described, as well as about 2,240 acres of land not platted or subdivided, but being farm land. Such action of the county commissioners was without authority of law and illegal, and was without any notice to your relator, nor did he have any knowledge of the said pretended incorporation and the alleged corporation of the municipality of College View until about the month of April, 1894, when your relator applied to pay his taxes on the above described land to the county treasurer of Lancaster county, Nebraska, when he was informed by said county treasurer that there was the sum of \$15 corporation tax against said land levied by the alleged corporation or municipality of the city of College View."

The petition will be more readily understood from the following map of the six sections therein named, the shaded parts being the relator's premises in section 6, and the platted portion of the village, to-wit, the south half of section 5. The boundaries of the village as incorporated are shown by the dark lines extending through sections 6 and 7 and 4 and 9:



It is boldly asserted that there exists no authority by virtue of statute or otherwise in the state for the inclusion within the boundaries of a city or village of a large tract of rural territory having no natural connection therewith and which, as in this case, is in nowise adapted to city or village purposes. A subject of such recognized importance, it might be supposed, has been definitely settled by judicial opinion in the absence of positive statute; but an examination of the cases proves that the precise question has seldom been presented for determination by the courts. The incorporation of cities of the second class and villages is regulated by the provisions of section 40, chapter 14, Compiled Statutes, which reads as follows: "Any town or village containing not less than two hundred nor more than fifteen hundred inhabitants, now incorporated as a city, town, or village, under the laws of this state, or that shall hereafter become organized pursuant to the provisions of this act, and any city of the second class which shall have adopted village government as provided by law, shall be a village and shall have the rights, powers, and immunities hereinafter granted, and none other, and shall be governed by the provisions of this subdivision. * * * *Provided further*, That whenever a majority of the taxable inhabitants of any town or village, not heretofore incorporated under any law of this state, shall present a petition to the county board of the county in which said petitioners reside, praying that they may be incorporated as a village, designating the name they wish to assume, and the metes and bounds of the proposed village, and if such county board or a majority of the members thereof shall be satisfied that a majority of the taxable inhabitants of the proposed village have signed such petition, and that inhabitants to the number of two hundred or more are actual residents of the territory described in the petition, the said board shall declare the said proposed village incorporated, entering the order of incorporation upon their records, and designating

the metes and bounds thereof; and thereafter the said village shall be governed by the provisions of this act applicable to the government of villages. And the said county board shall, at the time of the incorporation of said village, appoint five persons having the qualifications provided in section forty-two of this act, as trustees, who shall hold their offices and perform all the duties required of them by law until the election and qualification of their successors at the time and in the manner provided in this act."

In *State v. McReynolds*, 61 Mo., 203, the following statute was presented for construction: "Whenever two-thirds of the inhabitants of any town or village within this state shall present a petition to the county court of the county setting forth the metes and bounds of their village *and commons* and praying that they may be incorporated * * * the county court may declare such town or village incorporated, designating in such order the metes and bounds thereof; and thenceforth the inhabitants within such bounds shall be a body politic and corporate," etc. The foregoing, omitting for the present any reference to the words in italics, is not essentially different from ours. It was held, first, that the act contemplated the incorporation only of towns, villages, and their commons; second, that no authority was conferred upon the court to incorporate a farming community not a part of a town or village or the common belonging thereto; third, that the term commons, as used in the statute, meant lands included in or belonging to the town or village and set apart for public use; fourth, that where the order of incorporation includes a large tract of farming lands it is without jurisdiction and void, that the officers of the town or village have no authority to act even within the proper limits thereof, and that they may be proceeded against by *quo warranto*. The extent of the territory in that case was 1,200 acres, of which 900 acres was farming land and about 300 acres was included in the town and additions thereto.

But perhaps the most satisfactory exposition of the subject is to be found in a recent opinion of the supreme court of Minnesota in *State v. Village of Minnetonka*, 59 N. W. Rep., 972. The act therein involved is the following: "Any district, sections, or parts of sections, which has been platted into lots and blocks, also the lands adjacent thereto, * * * said territory containing a resident population of not less than 175, may be incorporated as a village." The court, in awarding a judgment of ouster, declare the evident purpose thereof to be "the incorporation of villages in the ordinary and popular sense, and not to clothe large rural districts with extended municipal powers or to subject them to special municipal taxation for purposes for which they are wholly unsuited." It is also said: "The law evidently contemplates as a fundamental condition to a village organization a compact center or nucleus of population or platted lands; and in view of the expressed purposes of the act, it is also clear that by the term 'lands adjacent thereto' is meant only those lands lying so near and in such close proximity to the platted portion as to be suburban in their character, and to have some unity of interest with the platted portion, in the maintenance of a village government. It was never designed that remote territory having no natural connection with the village, and no adaptability to village purposes should be included." Similar views are also expressed in *Vestal v. City of Little Rock*, 54 Ark., 321, and *People v. Bennett*, 29 Mich., 541.

It is true the territory sought to be incorporated (*supra*, in *State v. Village of Minnetonka*), some thirty-five sections, is largely in excess of that included within the boundaries of the village herein named; but we are, notwithstanding that fact, unable to perceive that the case cited differs in principle from the one before us. For, assuming the soundness of the respondents' argument, the only limitation upon the liability of rural property for the burdens of municipal government in this state is the discretion of the

county board in a strictly *ex parte* proceeding. It has been argued against the rule recognized in the cases cited that it is wanting in precision, and that it merely substitutes the discretion of one class of officers for that of another. But that criticism is, it seems, entirely unmerited. The rule therein applied is not only a reasonable one, but furnishes a safe and logical test for the ascertainment of the powers of the various officers and tribunals with respect to the boundaries of towns and villages. We do not doubt the unlimited power of the legislature in the absence of constitutional restriction, with respect to the boundaries of municipal corporations. (See 1 Dillon, *Municipal Corporations* [4th ed.], sec. 183; 2 Beach, *Public Corporations*, sec. 1400.) The question involved, however, is not one of constitutional, but of statutory construction, and the conclusion reached is believed to be the one most in harmony with the spirit of the act and which best accords with judicial utterance on the subject.

But an examination of the subject is necessarily incomplete which omits a reference to another aspect thereof, viz., that suggested by *South Platte Land Co. v. Buffalo County*, 15 Neb., 605, *McClay v. City of Lincoln*, 32 Neb., 412, and *Lancaster County v. Rush*, 35 Neb., 120. It was therein held that an action will not lie to enjoin the collection of taxes levied upon agricultural property within the boundaries of a city or village, or for the recovery of such taxes paid under protest. The validity of the incorporation, although apparently presented by the argument in each case, was not decided, the court holding that it could not be questioned in a collateral proceeding. In *South Platte Land Co. v. Buffalo County* it is said: "There is no doubt the owners of land not platted may object to such land being included within the boundaries of the corporation, and in a proper proceeding for that purpose may have it excluded. * * * We do not decide that the occupants of a town can by petition take in territory in

which they have no interest and attach it to a town." It is said also: "The petition for incorporation gave the commissioners jurisdiction, * * * and their action cannot be attacked in this collateral manner." The views herein expressed are not only consistent with the doctrine of those cases, but a careful reading of them suggests the conclusion which we have reached.

There remains to be considered the question of the appropriateness of the remedy by *quo warranto*. We were at first strongly impressed with the belief that the relator had an adequate remedy under the special provision of the statute (sec. 101, ch. 14, Comp. Stat.) for the disconnecting of territory from a city or village; but a closer inspection proves that it applies only to legal voters of the territory sought to be detached. The owner of property, therefore, who, as the relator in this case, resides outside the limits of such city or village, is not within the provisions of the statute, and must seek relief by means of a different proceeding; and the cases above cited leave no room to doubt that his remedy is by a direct proceeding for the purpose of determining the validity of the act of incorporation. But the effect of a continued user of corporate powers and functions by the village and afterwards by the city of College View, as suggested on the argument, is not presented by the demurrer, and we must not be understood as expressing any opinion on that subject. It may be that the rights of the respondents as officers of the city, within the actual limits thereof and over such unplatted territory as is attached thereto, with the knowledge and consent of the owners, should not be questioned at this time. The judgment will, therefore, be reversed and the cause remanded with directions to allow the respondents, on proper terms, to answer if they so elect and to proceed to judgment on the merits of the cause.

REVERSED AND REMANDED.

R. L. McDONALD & COMPANY V. EDWARD J. JENKINS
ET AL.

FILED MARCH 5, 1895. No. 6155.

1. **Partnership: EVIDENCE.** Where it is sought to charge a defendant as a copartner, the allegations of the petition being put in issue by the answer, the plaintiff is required to prove either a partnership in fact, or that the answering defendant permitted himself to be represented or held out as a partner in such way as to warrant third persons in making contracts relying upon his credit.
2. ———: ———: **DIRECTING VERDICT.** Evidence examined, and held not to sustain the allegation of partnership, and that the district court did not err in directing a verdict for the defendant.

ERROR from the district court of Clay county. Tried below before HASTINGS, J.

Thomas H. Matters, for plaintiffs in error.

J. L. Epperson & Sons, contra, cited, on the question of partnership: *Shriver v. McCloud*, 20 Neb., 474; *Converse v. Shambaugh*, 4 Neb., 376; *McCann v. McDonald*, 7 Neb., 305.

Post, J.

This controversy originated before a justice of the peace for Clay county, from whence it was taken by appeal to the district court of said county. The action was for goods sold and delivered, and against Edward J. Jenkins and John P. Jenkins, doing business in the firm name of E. J. Jenkins & Co. The first named defendant alone answered, denying all of the allegations of the petition, and specifically denying the alleged partnership. At the conclusion of the plaintiffs' case the district court directed a verdict for the answering defendant on the ground that there was a failure

of proof upon the material allegations of the petition, and which is the ruling now assigned as error.

The evidence bearing upon the transaction involved is both meager and unsatisfactory. It may, however, be inferred from the record that during the months of May and June, 1890, John P. Jenkins was, either on his own account or otherwise, engaged in mercantile business in the city of Fairfield, in said county, although the nature of such business does not clearly appear. On the 31st day of May of said year he ordered goods from the plaintiffs amounting to \$324.13, and on which there is now due a balance of \$131.63 and interest. The plaintiffs' representative who took the order, referring to the transaction, testified: "I sold John P. Jenkins a bill of goods. He told me that his father [the answering defendant] had an interest in the firm." He also consulted the cashier of a local bank regarding the financial standing of the defendant, but did not see or converse with him. The goods above mentioned were in due time shipped by the plaintiffs, consigned to E. J. Jenkins & Co., at Fairfield, and were upon their arrival at that point delivered to John P. Jenkins, the latter paying the charges thereon. The agent for the railroad company, who testified for the plaintiffs, could remember of the one consignment of goods only to E. J. Jenkins & Co., and on cross-examination testified that he had never heard of such a firm. The drayman who received the goods from the railroad company testified that he presented the freight bill to the defendant, but the latter refused payment, saying he had nothing to do with the business, and that the bill was afterward paid by John P. Jenkins, who appeared to be running the store. The foregoing, which is substantially all of the evidence adduced, we think warrants the direction complained of. Under the issues the burden was upon the plaintiffs to prove either a partnership in fact or that the defendant knowingly permitted himself to be represented or held out as a partner

 Sharp v. Johnson.

in such way as to warrant third persons in making contracts relying upon his credit. (Lindley, Partnership, 42; *Bucher v. Bush*, 45 Mich., 188.) It does not appear that the defendant was associated with John P. Jenkins as a partner, that he authorized the use of his name in that connection, or that he subsequently ratified the unauthorized contract. It follows that the judgment of the district court is right and must be

AFFIRMED.

LOUIS C. SHARP ET AL. V. CHARLES JOHNSON ET AL.

FILED MARCH 5, 1895. No. 4985.

Replevin: EVIDENCE OF OWNERSHIP: PLEADING. An allegation of general ownership in an action of replevin is not supported by proof of a mere lien or other special ownership. (*Musser v. King*, 40 Neb., 892; *Randall v. Iersos*, 42 Neb., 607.)

ERROR from the district court of Cuming county. Tried below before NORRIS, J.

M. McLaughlin and *J. C. Crawford*, for plaintiffs in error.

T. M. Franse, contra.

Post, J.

This was an action of replevin in the district court for Cuming county, the subject of the controversy being a field of corn levied upon by Sharp, one of the plaintiffs in error, to satisfy an execution against John Windell, and in favor of George Rowberg. The defendants in error thereupon instituted this action for the recovery of the property described, and were permitted to recover in the district court,

44	165
46	899
44	165
47	230
47	321
47	704
44	165
50	335
50	508
50	586
50	797
54	513
55	461

Sharp v. Johnson.

when the cause was removed into this court for review upon the petition in error of the sheriff.

Numerous errors are alleged, of which we shall notice but one, and which is presented by different assignments of the motion for a new trial, and the petition in error, viz., the admission in evidence of Exhibit A, being the instrument upon which defendants in error base their claim of title to the property in dispute. For a perfect understanding of the question under consideration, it is necessary to refer to the pleadings, which consist of an allegation of general ownership on the part of the plaintiff below, and a general denial by the defendant. The instrument offered in evidence, although denominated a "bill of sale," appears from its face to have been intended as security for an indebtedness due from Windell to the plaintiffs below. We have presented, therefore, the question, does proof of a mere lien or other special interest, in an action of replevin, sustain an allegation of general ownership? The precise question was presented in *Musser v. King*, 40 Neb., 892, and was there resolved in the negative, and which was followed in *Randall v. Persons*, 42 Neb., 607. And in view of the careful examination by Commissioner RAGAN of the question therein presented, a further examination of the subject at this time would be entirely superfluous. It follows that the ruling assigned is error, for which the judgment must be reversed and the cause remanded for further proceedings in the district court.

REVERSED AND REMANDED.

GEORGE PRAY V. OMAHA STREET RAILWAY COMPANY.

FILED MARCH 5, 1895. No. 6453.

44	167
44	459
44	167
47	95
44	167
50	909
54	674

1. **Street Railways: NEGLIGENCE OF PASSENGER.** It is not such negligence for a passenger to stand on the front steps of a crowded street car while in motion as will *per se* prevent a recovery for injuries received in consequence of the negligence of persons in charge thereof.
2. **Carriers: STREET RAILWAYS: CROWDED CARS: NEGLIGENCE.** It is evidence of negligence on the part of a street railway company to carry passengers greatly in excess of the seating capacity of its trains, and permitting them to stand on the platforms and steps of the cars.
3. ———: ———: ———. A person standing on the steps of a moving street car, being unable to secure a seat or standing room within, is presumed to be there with the consent of the servants in charge of the train.
4. ———: ———: NEGLIGENCE: PERSONAL INJURIES. Street railway companies in this state are common carriers, and are presumptively liable for the concurrent negligence of their servants and third persons resulting in personal injuries to passengers.
5. ———: ———: ———: ———: ACTION FOR DAMAGES: QUESTION FOR JURY. The plaintiff, a lad of fourteen years of age, boarded the defendant's train at South Omaha, bound for the city of Omaha. When he reached the train, which was waiting at the terminus of the line, it was so crowded that he was unable to get inside, but secured standing room on the rear platform of the trailer. When the first stop was made four blocks distant he stepped off the train to assist a fellow passenger to alight and was unable to get upon the platform again, his place being occupied by other passengers. He went forward immediately and secured standing room on the front step of the trailer, holding on to the dash board and to the iron rail attached to the car, for the distance of a block, when he was forced, by the pressure of the other passengers on the platform, to relinquish his hold, and fell, receiving the injuries complained of. There was evidence tending to prove that the pressure which forced him off the train was occasioned by the conductor forcing his way through the crowd while engaged in collecting fares. *Held*, That the question of negligence was for the jury, and that it was error to direct a verdict for the defendant.

ERROR from the district court of Douglas county. Tried below before DAVIS, J.

The opinion contains a statement of the case.

John O. Yeiser, for plaintiff in error :

Street railway companies are common carriers of passengers and are liable for the slightest negligence. (*Spellman v. Lincoln Rapid Transit Co.*, 36 Neb., 890; *Baltimore & O. R. Co. v. Wightman*, 29 Gratt. [Va.], 432; *Farish v. Reigle*, 11 Gratt. [Va.], 697; *North Chicago Street R. Co. v. Cook*, 33 N. E. Rep. [Ill.], 958; *Frink v. Potter*, 17 Ill., 406.)

Ordinary care in protecting himself is all that the law requires of a passenger. (*Sheridan v. Brooklyn C. & N. R. Co.*, 36 N. Y., 39; *Thurber v. Harlem B. M. & F. R. Co.* 60 N. Y., 131.)

The crowded condition of the car was evidence of negligence. The act of plaintiff in standing on the step of a moving car was not such contributory negligence as would prevent a recovery for personal injuries. The court therefore erred in directing a verdict for defendant. (*West Chester & P. R. Co. v. McElvee*, 67 Pa. St., 311; *Germantown P. R. Co. v. Walling*, 97 Pa. St., 60; *Chicago City R. Co. v. Mumford*, 97 Ill., 560; *Dougherty v. Missouri R. Co.*, 81 Mo., 330; *Chicago & A. R. Co. v. Wilson*, 63 Ill., 167; *Chicago W. D. R. Co. v. Mills*, 105 Ill., 63; *Chicago & A. R. Co. v. Arnol*, 33 N. E. Rep. [Ill.], 204; *North Chicago Street R. Co. v. Cook*, 33 N. E. Rep. [Ill.], 958; *Sheridan v. Brooklyn C. & N. R. Co.*, 36 N. Y., 40; *Topeka City R. Co. v. Higgs*, 38 Kan., 379; *Leigh v. Omaha Street R. Co.*, 36 Neb., 131; *O'Mara v. Hudson R. R. Co.*, 38 N. Y., 445; *Bigelow v. Rutland*, 4 Cush. [Mass.], 247; *Spofford v. Harlow*, 85 Mass., 179; *Spooner v. Brooklyn City R. Co.*, 54 N. Y., 230; *Burns v. Bellefontaine R. Co.*, 50 Mo., 140; *Gavett v. Manchester & L. R. Co.*, 16

Gray [Mass.], 501; *Todd v. Old Colony & F. R. R. Co.*, 3 Allen [Mass.], 18; *Gahagan v. Boston & L. R. R. Co.*, 1 Allen [Mass.], 187; *Lucas v. New Bedford & T. R. Co.*, 6 Gray [Mass.], 64; *Meesel v. Lynn & B. R. Co.*, 8 Allen [Mass.], 234; *Thurber v. Harlem B. M. & F. R. Co.*, 60 N. Y., 331; *Haycroft v. Lake Shore & M. S. R.*, 2 Hun [N. Y.], 490; *Village of Orleans v. Perry*, 24 Neb., 833; *Atchison & N. R. Co. v. Bailey*, 11 Neb., 332; *Sioux City & P. R. Co. v. Stout*, 17 Wall. [U. S.], 657; *City of Lincoln v. Gillilan*, 18 Neb., 116; *Bigelow v. Rutland*, 58 Mass., 247.)

John L. Webster, contra, cited: *Nichols v. Middlesex R. Co.*, 106 Mass., 463; *Pitcher v. People's Street R. Co.*, 26 Atl. Rep. [Pa.], 559; *Chicago West Division R. Co. v. Mills*, 91 Ill., 39; *Sanford v. Hestonville, M. & F. P. R. Co.*, 136 Pa. St., 84.)

Post, J.

About 6 o'clock P. M. of the 29th day of November, 1892, the plaintiff, a lad fourteen years of age, employed in one of the packing houses at South Omaha, boarded one of the defendant's motor trains in order to reach his home in the city of Omaha. When he approached the train, which was then waiting at the southern terminus of the line, he observed that the seats were all occupied and that there was not even standing room remaining inside. He, however, secured standing room on the rear platform of the trailer, where he remained until the train started about five minutes later, and until it made the first stop four blocks distant for the purpose of allowing a passenger to alight. At that point he was, according to his testimony, on account of the pressure of passengers from within, compelled to step from his position to the ground in order to make room for the passenger above mentioned, when his place was immediately filled by other passengers, leaving

no standing room on the platform. As the train was in the act of starting again he went forward and took a position on the right front step of the trailer, but was unable to get upon the platform on account of the crowd thereon. He, however, remained clinging to the rod attached to the car and dash board, holding a dinner pail in one hand until the train had run the distance of one block when he was forced to relinquish his hold on account of the pressure of the other passengers and fell, receiving the injuries complained of. He testifies further that the pressure which forced him from the train was occasioned by the movement of the passengers on the platform, but the cause of such movement he does not attempt to explain. Another witness testifies that the conductor was, when the accident occurred, near the front door of the trailer and going forward in the act of collecting fares. So that a reasonable inference is that the movement of the passengers on the front platform was caused by the approach of the conductor forcing his way through the crowd. The district court, on the conclusion of the plaintiff's case, directed a verdict for the defendant and which is the ruling now assigned as error.

It is necessary to notice but a single paragraph of the petition, viz.: "That said defendant, through carelessness and negligence in not providing cars enough for the transportation between said points, caused a dangerously large crowd of people to board said car on which the plaintiff was a passenger; that the said defendant, through its agents and servants, when said car in which the plaintiff was a passenger was loaded with all the passengers it could safely carry, negligently and carelessly suffered and permitted a large additional number of people to board said car and overcrowd the same; that by reason of so dangerously large a crowd negligently and carelessly suffered and permitted on said car by defendant, the plaintiff was forced off said car to allow fellow-passengers to alight therefrom; that imme-

diately plaintiff proceeded to re-enter said car, and before he could reach a safer position, while standing upon the steps, * * * the crowd so negligently and carelessly permitted upon said car * * * shoved back to get room and were forced back by the conductor of said line, one of the defendant's servants, while engaged in collecting the fares from said crowd, which pushed against the plaintiff with such force as to break his hold and to throw him from said moving train; that in said manner plaintiff was crowded off of said car by defendant's negligence and carelessness." It was held in *Spellman v. Lincoln Rapid Transit Co.*, 36 Neb., 890, that street railway companies are common carriers of passengers, and as such are answerable for the negligence of their servants upon the principles of the common law; that in providing for the safety of passengers they are bound to exercise the highest degree of care and diligence consistent with the nature of their undertaking, and are responsible for the slightest negligence on the part of their employes. If it be true, as appears from the plaintiff's evidence, that the defendant's servants in charge of the train undertook to carry a number of persons greatly in excess of its capacity, so that passengers, including the plaintiff, were compelled to stand on the platform and steps of its cars, and the injury complained of is the direct result of such overcrowded conditions, that fact must, in the light of the authorities hereafter cited, be regarded as evidence of negligence; but it is said that the act of riding on the overcrowded train, and particularly on the steps of the trailer, is, under the circumstances of this case, *per se*, contributory negligence, which will prevent a recovery. In the consideration of that question it is deemed necessary to examine some of the authorities which seem to bear directly upon the subject.

In Ray, Negligence of Imposed Duties, 43, it is said that the front platform of a crowded street car is not a place of known danger so as to render it negligence *per se*

for an adult person to stand thereon while the car is in motion.

In *Germantown P. R. Co. v. Walling*, 97 Pa. St., 55, the plaintiff voluntarily got upon a car so crowded that he was obliged to stand on one of the steps of the platform, which was also occupied by two other persons, and where, in order to retain his position, he was required to hold with one hand to the dashboard and with the other to the iron bar under the window of the car. The court, referring to the question of contributory negligence, say: "Street railway companies have all along considered their platforms as a place of safety, and so have the public. Shall the court say that riding on a platform is so dangerous, that one who pays for standing there can recover nothing for an injury arising from the company's default?"

In *Meesel v. Lynn & B. R. Co.*, 8 Allen [Mass.], 234, it is said: "The seats inside are not the only places where the managers expect passengers to remain, but it is notorious that they stop habitually to receive passengers to stand inside until the car is full, and continue to stop and receive them even after there is no place to stand except on the steps of the platforms. Neither the officers of these corporations, nor the managers of the cars, nor the traveling public seem to regard this practice as hazardous, nor does experience thus far seem to require that it should be restrained on account of the danger. There is, therefore, no basis upon which the court can decide, upon the evidence reported, that the plaintiff did not use ordinary care."

In *Nolan v. Brooklyn City & N. R. Co.*, 87 N. Y., 63, the plaintiff, a passenger on a street car, rode on the front platform of his own choice for the purpose of smoking, there being room inside. He was thrown from the car and injured through the defendant's negligence, and was permitted to recover.

In *Topeka City R. Co. v. Higgs*, 38 Kan., 379, it was held gross negligence on the part of a street railway com-

pany to carry persons greatly in excess of the seating capacity of its cars, and permit passengers to ride on the platforms and foot-boards thereof, so as to expose them to danger of collision with its other trains.

In *Geitz v. Milwaukee City R. Co.*, 72 Wis., 307, the plaintiff at the time of the injury was standing on the foot-board extending lengthwise along the car, which was crowded with passengers, yet the question of negligence was held to have been properly submitted to the jury.

City R. Co. v. Lee, 50 N. J. Law, 438, presents substantially the same state of facts as the case last cited, and the judgment in favor of the plaintiff was affirmed. And the doctrine above announced finds support also in the following among many other cases: *Maguire v. Middlesex R. Co.*, 115 Mass., 239; *Fleck v. Union R. Co.*, 134 Mass., 481; *Upham v. Detroit City R. Co.*, 85 Mich., 12; *Archer v. Ft. Wayne & E. R. Co.*, 87 Mich., 101; *Matz v. St. Paul City R. Co.*, 53 N. W. Rep. [Minn.], 1071.

The record is silent on the subject of the defendant's notice of the condition of the train, but in the absence of evidence we must presume that the plaintiff, if not invited to become a passenger, was present with the knowledge and consent of the conductor. It follows that the boarding of the crowded train, under the circumstances disclosed, was not such negligence as to alone justify the trial court in directing a verdict against the plaintiff.

Was the plaintiff guilty of contributory negligence in leaving the rear of the train and taking a position on the front step of the trailer? There are certain material facts which must not be overlooked in the determination of that question. In the first place, the relation of carrier and passenger existed at that time, and the defendant, having voluntarily assumed the responsibility of safely carrying plaintiff, owed him a duty in that regard, and is at least presumptively liable for the concurrent negligence of its servants and third persons. (*Sheridan v. Brooklyn C. & N. R. Co.*, 36 N. Y., 39;

Lehr v. Steinway & H. P. R. Co., 118 N. Y., 556; *Holly v. Atlantic Street R. Co.*, 61 Ga., 215.) It will be remembered, too, that the plaintiff did not voluntarily abandon his position on the rear platform, but was unable to again board the train after standing aside to allow a fellow passenger to alight. The act of going forward to the front platform was not of itself hazardous, for which the plaintiff should be charged with negligence. In *Dixon v. Brooklyn City & N. R. Co.*, 100 N. Y., 170, the plaintiff tried to enter the defendant's car, which was moving slowly, by the rear platform; but finding it crowded he passed along by the car in order to reach the front platform, and in so doing slipped on the snow and ice thrown up by the defendant's plows and fell under the wheels. It was held that the question of contributory negligence was rightly submitted to the jury. Nor does the evidence warrant the inference that the plaintiff's position on the front step was either actually or apparently more dangerous than that which he had been compelled to relinquish on the rear platform. Referring to his position on the front step he testifies:

Q. Were you able to get any further in the car at that time?

A. No, sir.

Q. Why?

A. Because the car was moving and I would have run a great risk to crowd in.

Q. Had the car not started so soon, could you have gotten further on the platform?

A. Yes; I think I could. I am pretty sure I could.

Q. Could you have pulled up any further on the platform without letting go your grip on the hand rails?

A. No.

The rule is too well settled in this state to admit of a doubt or to require a citation of the cases, that where different minds may draw different conclusions from the facts

in evidence to support a charge of negligence, it is a question of fact and not of law. In the case at bar the inference that the injury proved was caused by the concurrent negligence of the defendant in permitting the car to be crowded beyond its capacity, and of the plaintiff's fellow passengers in forcing him from his position on the step, in the absence of contributory negligence on his part, is, to say the least, a reasonable one. The question was, therefore, one upon which the plaintiff was entitled to the verdict of the jury, hence the court erred in its peremptory direction in favor of the defendant, for which the judgment must be reversed, and the cause remanded for further proceedings in accordance with the views herein stated.

REVERSED AND REMANDED.

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MIRANDA J. McCLARY ET AL. V. JOHN S. STULL ET AL.

44	175
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FILED MARCH 5, 1895. No. 6512.

- Wills: PROBATE: VALID AND INVALID BEQUESTS: INCAPACITY OF BENEFICIARY.** It is no objection to the probate of a will containing one or more valid bequests that a particular bequest or devise is invalid on the ground that the beneficiary thereof is incapable of taking or holding the property sought to be thereby disposed of.
- _____:** _____. The will in such case should be proved for the purpose of giving effect to the valid provisions thereof.
- Trial: VERDICT: FAILURE OF JURY TO MAKE SPECIAL FINDINGS: HARMLESS ERROR.** It is not reversible error to receive a general verdict or finding, leaving unanswered special interrogatories submitted to the jury, when, if answered in the form most favorable to the complaining party, they would not be inconsistent with the general verdict.
- Wills: MENTAL CAPACITY OF TESTATOR: SPIRITUALISM.** Mere eccentricity of belief, including a belief in spiritualism so-called, is not conclusive evidence of a want of testamentary capacity,

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provided the testator is not affected with any delusion respecting matters of fact connected with the making of the will or the objects of his bounty.

5. ———: ———: PROBATE. Where the testator's mind is not so controlled by his peculiar views as to prevent the exercise of a rational judgment touching the disposition of his property the will should be sustained, however absurd or irrational such views may be.
6. ———: ———. Where the testator is not claimed to have been generally insane, but controlled by insane notions with respect to a particular subject, the question to be determined is whether he was the victim of such delusions as controlled his actions and rendered him insensible to the ties of blood and kindred.
7. Trial: RECALLING OF JURY: INSTRUCTIONS: REVIEW. The recalling of juries for instructions is so far within the discretion of the trial court as not of itself to present a subject for review.
8. Instructions: HARMLESS ERROR. The charge of the court should be confined to questions in issue, although a judgment will not be reversed on account of an instruction directed to a matter foreign to the issues which merely imposes upon the successful party an additional and unnecessary burden, and in no wise prejudicial to the party complaining.
9. Attorneys' Fees: ALLOWANCE: FUNDS UNDER CONTROL OF COURT. Courts of equity, in dealing with funds brought directly within their control, frequently order payment therefrom of fees to counsel of the respective parties; but that practice rests upon the theory that the proceeding is primarily for the purpose of securing the direction of the court with respect to such fund, and therefore alike beneficial to all parties.
10. ———: ———. Fees to counsel are not in such cases allowed as a matter of right, but are within the discretion of the court and will be denied unless there appears to be reasonable ground for the controversy by the party applying therefor.
11. Wills: CONTESTS: ATTORNEYS' FEES: ALLOWANCE. On an application for attorneys' fees by the contestants who had unsuccessfully resisted the probate of a will, one of them made affidavit to an agreement in writing with their attorneys, whereby the latter were to prosecute the contest for twenty per cent of the amount realized out of the estate. In answer, they denied the existence of a written contract without disclosing their agreement with contestants. Held, That the application should be denied.

12. ———: EVIDENCE OF VALIDITY. Evidence examined, and held to sustain the verdict establishing the will of the testatrix.

ERROR from the district court of Nemaha county. Tried below before BUSH, J.

The facts are stated in the opinion.

W. C. Sloan and *A. J. Burnham*, for plaintiffs in error:

The pretended will seeks to raise a trust to a charitable use, and in order that there be a good devise or bequest there must be a clearly defined beneficiary who can take under the will; and unless there is such beneficiary the bequest is void, and such beneficiary must be one who can enforce the trust in a court of equity. (*Tilden v. Green*, 130 N. Y., 29; *Levy v. Levy*, 33 N. Y., 97; *Prichard v. Thompson*, 95 N. Y., 76; *Read v. Williams*, 125 N. Y., 560; *Lepage v. McNamara*, 5 Ia., 125; *Fosdick v. Town of Hempstead*, 125 N. Y., 581; *Owens v. Missionary Society*, 14 N. Y., 380; *Dashiell v. Attorney General*, 9 Am. Dec. [Md.], 572; *Bridges v. Pleasants*, 44 Am. Dec. [N. Car.], 100; *Holland v. Alcock*, 108 N. Y., 312; *Heiss v. Murphey*, 40 Wis., 276; *Estate of Hoffen*, 70 Wis., 522; *Gallego v. Attorney General*, 3 Leigh [Va.], 487; *Walderman v. City of Baltimore*, 8 Md., 551; *White v. Fisk*, 22 Conn., 31.)

The will is void for uncertainty as to beneficiaries, and as to its objects and purposes. It substitutes the will of the trustees for that of the testatrix. The court cannot enforce the trust sought to be created by the will. (*Dashiell v. Attorney General*, 9 Am. Dec. [Md.], 572; *Wheeler v. Smith*, 9 How. [U. S.], 55; *Beall v. Drane*, 25 Ga., 430; *Trippe v. Frazier*, 4 Har. & J. [Md.], 344; *Goddard v. Pomeroy*, 36 Barb. [N. Y.], 546; *Grimes v. Harmon*, 35 Ind., 198; *Fontain v. Ravenel*, 17 How. [U. S.], 369; *Beekman v. Bonsor*, 23 N. Y., 298; *Yingling v. Miller*, 26 Atl. Rep. [Md.], 491; *Andrew v. New York Bible Society*, 4 Sandf. [N. Y.], 156; *Rhodes v. Rhodes*, 13 S. W. Rep.

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[Tenn.], 590; *Montgomery v. Montgomery*, 11 S. W. Rep. [Ky.], 596; *Sutherland v. Sydnor*, 6 S. E. Rep. [Va.], 480; *Couch v. Eastham*, 3 S. E. Rep. [W. Va.], 23; *Stokes v. Van Wyck*, 3 S. E. Rep. [Va.], 387; *New Orleans v. Hurdie*, 9 So. Rep. [La.], 12; *Bristol v. Bristol*, 53 Conn., 242.)

The Society of the Home for the Friendless has no legal capacity to take under the will either absolutely or as trustee. (*State v. Atchison & N. R. Co.*, 24 Neb., 144.)

It was error to recall the jury without a request from them and give an instruction at the request of proponents. (*Yates v. Kinney*, 23 Neb., 648.)

It was error to receive the general verdict and discharge the jury without special findings. (*Doom v. Walker*, 15 Neb., 339.)

Contestants' attorneys are entitled to an allowance for fees out of the proceeds of the estate. (*Seebrook v. Fedawa*, 33 Neb., 413.)

The following authorities were also referred to by counsel for plaintiffs in error in their argument on the question of the capacity of the testatrix to make a will: *Klosterman v. Alcott*, 27 Neb., 685; *Galloway v. Hicks*, 26 Neb., 531; *City of Orete v. Childs*, 11 Neb., 252; *Meyer v. Midland P. R. Co.*, 2 Neb., 319.

J. H. Broady, contra:

The proponents should, in the first instance, make out a *prima facie* case which follows from the proof of execution. Then the burden of proof of insanity is on contestants. Afterward original testimony of sanity may be offered by the proponents. (*Seebrook v. Fedawa*, 30 Neb., 424; *Chrisman v. Chrisman*, 18 Pac. Rep. [Ore.], 6.)

Capacity to make a contract is sufficient capacity to make a will. It is not necessary that the testator be mentally or bodily sound, or that he have no delusions. (*Spratt v. Spratt*, 43 N. W. Rep. [Mich.], 627; *Hoban v. Piquette*,

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17 N. W. Rep. [Mich.], 797; *Rice v. Rice*, 15 N. W. Rep. [Mich.], 545; *Dullam v. Wilson*, 19 N. W. Rep. [Mich.], 122; *Otto v. Doty*, 15 N. W. Rep. [Ia.], 578; *Meeker v. Meeker*, 75 Ill., 266; *Rutherford v. Morris*, 77 Ill., 410; *Smith v. Jones*, 34 N. W. Rep. [Ia.], 309.)

Spiritualism is neither insanity nor an insane delusion. An insane delusion does not break a will unless it be proven that the will is the product of the delusion. (*Fifield v. Gaston*, 12 Ia., 218; *In re Smith's Will*, 8 N. W. Rep. [Wis.], 616; *Fraser v. Jennison*, 3 N. W. Rep. [Mich.], 882; *Latham v. Schaal*, 25 Neb., 540.)

Contestants are not entitled to an allowance for attorneys' fees. (*Titlow's Estate*, 29 Atl. Rep. [Pa.], 758; *West v. Place*, 23 N. Y. Sup., 1090.)

The following cases were also cited by counsel for defendants in error: *Walton v. Ambler*, 29 Neb., 643; *Graham v. Birch*, 49 N. W. Rep. [Minn.], 697; *Chadwick v. Chadwick*, 13 Pac. Rep. [Mont.], 385; *American Tract Society v. Atwater*, 30 O. St., 87; *Raley v. County of Umatilla*, 13 Pac. Rep. [Ore.], 892; *Webster v. Morris*, 28 N. W. Rep. [Wis.], 353; *In re Gibson's Estate*, 17 Pac. Rep. [Cal.], 438; *Dodge v. Williams*, 50 N. W. Rep. [Wis.], 1103; Jarman, Wills, 377; Beach, Wills, sec. 137.

Post, J.

This was a proceeding for the proof of the will of Elizabeth C. Handley, deceased, and originated in the county court of Nemaha county. The defendants in error, John S. Stull and Frank E. Johnson, who for convenience will be referred to as the proponents, are named as executors of the will, and the plaintiffs in error, who will be referred to as contestants, are the heirs at law of the deceased. The proceedings in the county court are not involved in the present controversy and will not, therefore, be noticed further in this opinion. The trial in the district court, as will be inferred from what has been said, resulted in a verdict

and judgment establishing the alleged will, and which the contestants have removed into this court for review upon allegations of error. For a more perfect understanding of the issues involved it is deemed proper to set out the will at length, which is as follows:

"In the name of the benevolent Father of All, I, Elizabeth C. Handley, being of sound mind and memory and in fair health, realizing the uncertainty of this life, do hereby make and publish my last will and testament.

"Item First. It is my will and desire that after my death I be buried by the side of my late husband in Walnut Grove cemetery, at the village of Brownville, in Nemaha county, state of Nebraska; and that my executors hereinafter named complete the record upon the monument now erected on the burial lot and to place at my grave suitable head and foot slabs.

"Item Second. I give, grant, and bequeath unto my beloved nephew, John C. Ward, all of my books of every description, my gold watch and chain, and all of my other jewelry of every description, and such of my family pictures as he may desire.

"Item Third. I do hereby give, grant, and bequeath unto the Home for the Friendless, now located at the city of Lincoln, in the state of Nebraska, my piano and all of my china and table ware of every description, to be owned and kept and used by said Home forever.

"Item Fourth. I hereby give, grant, and bequeath unto the said Home for the Friendless all of my household and kitchen furniture of every description; and it is my wish that the officers of said Home shall have the privilege of using said furniture or any part thereof in said Home, or to dispose of the same or any part thereof and to convert the same into money, and to use said money in such manner as they may see fit for the benefit of the inmates of said house.

"Item Fifth. It is my desire and command that my executors hereinafter named shall collect all of my property, both personal and real, bonds, stocks, credits, goods, chattels, choses in action and everything of value, except such as are herein bequeathed as above set forth, and to sell the same either at public or private sale, as may seem to them to be most advantageous; and to convert the same into money as soon after my death as the same can be done without sacrifice, and out of the proceeds of said sale to first pay all of my just debts, funeral expenses and expense of my last sickness, and the expenses of administration, and all the moneys remaining after carrying out the provisions of this will, as above set forth, I hereby give, grant, and bequeath unto the said Home for the Friendless, now located in the city of Lincoln, Nebraska.

"In this my last will and testament I well remember all of my relations, both near and remote, and as I am under no particular obligations to them or either of them, and desiring that my estate may be used for the very unfortunate class of persons who have a right to be admitted into said Home for the Friendless, I feel it to be my sacred duty to give all that I have left in this world to said Home for the benefit of the poor unfortunate people who are cared for by this Home, the grandest institution in the state of Nebraska.

"Item Sixth. I do hereby nominate and appoint Frank E. Johnson, of Lincoln, Nebraska; Harry D. Clark, of Hot Springs, South Dakota, and John S. Stull, of Auburn, Nebraska, or the survivors of them in case of the death of either of them, executors of this my last will and testament, hereby authorizing and empowering them to adjust, release, and discharge in such manner as they may deem proper, the claims, debts, and demands due me. I hereby authorize, direct and empower them to sell at public or private sale, as may seem to them to be the most advantageous, all my real and personal estate, and to execute and acknowledge, and to deliver to the purchaser of the same proper deeds in

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fee-simple. I also further authorize and direct my said executors to reduce and convert into money all of my estate except such as is mentioned in items second, third, and fourth, and to first pay the debts and demands mentioned in items first and fifth, and then to pay the entire balance left to the said Home for the Friendless.

"I do hereby revoke all former wills by me at any time made. In testimony whereof, I have hereunto set my hand and seal this 26th day of January, in the year of our Lord one thousand eight hundred and ninety-two.

"ELIZABETH C. HANDLEY.

"Signed and acknowledged by said Elizabeth C. Handley as her last will and testament in our presence and in the presence of each other, and signed by us in her presence and at her request; and we do hereby certify that at this time the said Elizabeth C. Handley is of sound and disposing memory.

"Done at Auburn, Nebraska, this twenty-sixth day of January, A. D. 1892.

"JARVIS S. CHURCH, Auburn, Neb.

"J. L. CARSON, JR., Auburn, Neb.

"R. C. BOYD, Auburn, Neb."

The contestants, who, with the exception of John C. Ward, are the brothers and sisters of the deceased, joined in resisting the probate of the will on the following among other grounds:

1. That the deceased was not of sound and disposing mind at the time in question, and that said alleged will is the result of an insane delusion on her part by reason of which she was altogether incapable of disposing of her property, and is therefore utterly void.

2. Said will is void for the reason that the beneficiaries thereunder are uncertain and cannot be ascertained.

3. The Home for the Friendless named in said will is without legal capacity to take or hold the property thereby sought to be disposed of.

John C. Ward, who is the sole surviving heir of Comfort Ward, *nee* Scott, a deceased sister of the testatrix, and who is the legatee named in the second item or paragraph of the will, separately objected to the allowance of items Nos. 3, 4, 5, and 6 thereof on the ground that the beneficiaries are uncertain, and because the Home for the Friendless has no capacity to take or hold thereunder.

The several contestants who join in the prosecution of this proceeding in error devote many pages of their printed brief to an exhaustive review of the authorities bearing upon the validity of the provision in favor of the Home for the Friendless, and which would without doubt prove instructive in a proceeding having for its object the construction of that provision of the will; but a closer inspection of the pleadings has satisfied us that that question is not thereby put in issue. It appears from a reference to the allegations of the several contestants that no specific objection is made therein to the bequest in favor of John C. Ward. And assuming the deceased to have been possessed of the requisite mental capacity to thus dispose of her property, it follows that the will should be admitted to probate for the purpose of giving effect to that bequest without reference to the other provisions thereof. (*Greenwood v. Murray*, 26 Minn., 259; *Graham v. Burch*, 47 Minn., 171; *Farmer v. Sprague*, 57 Wis., 324; *Jones v. Roberts*, 54 N. W. Rep. [Wis.], 917; *Burkett v. Whittemore*, 15 S. E. Rep. [S. Car.], 616; *In re Will of Merriam*, 136 N. Y., 58; *Ware v. Wisner*, 50 Fed. Rep., 310; *Sumner v. Crane*, 155 Mass., 483.)

Passing to the question of the mental capacity of the deceased, we observe that the first assignment relating to that branch of the case is the giving of instructions Nos. 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, and 13 at the request of proponents. Some, indeed most, of the propositions in the instructions complained of are admitted to be accurate statements of the law. It has been settled by repeated decisions

of this court that an assignment of the giving or refusing of a group of instructions *en masse* will be considered only so far as to determine whether one or more of them correctly state the law applicable to the cause. But while we are unable to separately examine the several instructions mentioned, the contestants are in no degree prejudiced on that account, since, fortunately for them, the questions there presented are all included within the capacity of the deceased to dispose of her property by will,—a proposition which will be hereafter considered under another assignment.

The next contention which we will notice is that the district court erred in not requiring the jury to answer certain interrogatories in connection with their general verdict, to-wit:

“1. Was the mind of Elizabeth Handley at about the time of the making of the will in question affected with a delusion that she could hold direct communication with the spirit of her deceased husband, and of other deceased persons?

“2. Did such delusion influence or control the mind, actions, and conduct of Mrs. Handley in her business transactions?

“3. Was the mind of Mrs. Handley affected by a delusion at the time she executed the will in question, and was she influenced in making her will by such delusion?

“4. Was Elizabeth C. Handley of sound mind and memory when she executed said will?”

Of the foregoing questions it may be said that all except the fourth, which is in terms answered by the general finding, suggest merely evidential facts, and are not, therefore, within the contemplation of section 292 of the Code, by which it is provided that special verdicts “must present the facts as established by the evidence, and not the evidence to prove them; and they must be so presented that nothing remains for the court but to draw from them conclusions

of law.” Mere delusions such as are contemplated by the interrogatories are not, as we shall presently see, conclusive evidence of a want of testamentary capacity. Had said interrogatories been answered in the manner most favorable to contestants, they would not have been entitled to judgment thereon, since such findings would still have been consistent with the general verdict. It follows that the district court did not err in receiving the verdict without requiring the jury to answer the interrogatories submitted to them. (*First Nat. Bank of North Bend v. Miltonberger*, 33 Neb., 847.) The deceased was then sixty years of age and had been a widow about ten years. The estate of her husband, to which she succeeded on his death, was valued at \$36,000 or \$37,000. She was evidently a woman of average intellectual endowments, and invariably managed or directed her own business affairs. Although she did not, as the result of her management, succeed in accumulating much, if any, during her widowhood, she left unimpaired the fortune inherited from her husband after contributing liberally, for one of her means, to works of charity and to religion and assisting materially her less fortunate relatives. She was a devout church-woman and deeply interested in the cause of temperance. In the summer of 1888 she attended as a delegate the national convention of the prohibition party which met in the city of Indianapolis. She was for several years a member and vice-president of the Society of the Home for the Friendless, and sought earnestly to advance its cause and usefulness. She was also recognized in the city of Brownville, where she resided for nearly if not quite forty years, as a woman of more than the average strength of character and shrewdness, and, barring the single exception, which will now be noticed, gave evidence of no mental infirmity tending in any degree to impair her testamentary capacity. There is in the record evidence which tends to prove that she was a believer in the doctrine of spiritualism and seems to have

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been under the impression that she could directly and through the instrumentality of the planchette communicate with the spirits of the dead, including her deceased husband. The only evidence tending directly to establish any relation between such delusions and the execution of the will is that of Mrs. Smith, from which we quote the following:

Q. How did she act or claim to act in connection with spiritualism, or what did she do about it?

A. I think I know she was under the control in a great many of her actions and in all of her trips and business by what Planchette said. * * *

Q. She told you this?

A. Yes, sir; she told me herself.

Q. State as near as you can what she did say.

A. The last time I saw her I went to bid her good-bye. She seemed very much excited in health and looked poorly. She said she had been consulting Planchette, and it had advised her about her affairs, and she wanted to go and see Judge Stull and have him transact some business for her.

Q. When was this conversation?

A. During the last part of January, 1892. * * *

Q. Now, state as well as you can just what she said she would have to do about the latter part of January, 1892, at the time you spoke of.

A. She said she was going to see Judge Stull in regard to some business that Planchette had advised her to. * *

The will, it should be remarked in this connection, was prepared by Judge John S. Stull, and bears date, as we have seen, of January 26, 1892, from which it is argued that her action was the direct result of the delusions above mentioned, and which so controlled her judgment as to render her insensible to the ties of consanguinity. That contention renders necessary an examination of the evidence which bears directly upon the execution of the will. Judge Stull, who had known the deceased intimately for twenty-one years, testified that she requested him to prepare her

will early in January, 1892, but being engaged at the time he made a note of her directions from which he subsequently drew the will and forwarded it to her by mail. She visited him twice or more between that date and the day of its execution, when, after some trifling changes which were made at her direction, it was taken by her to the Carson National Bank, where she had long kept an account, in order that it might be witnessed by some of the officers thereof, most of whom were acquaintances and personal friends. She was, in the opinion of the subscribing witnesses, perfectly sane, and capable of transacting her business. Of said witnesses Judge Church had known the deceased twenty-six years, Mr. Boyd seven years, and Mr. Carson, who was twenty-three years of age, had known her since his earliest recollection, and neither had ever heard her mental soundness called in question. They are corroborated also by Judge Stull's partner, Mr. Edwards, who was present when the deceased gave the directions in accordance with which the will was prepared. To Mr. Johnson, an intimate friend, who had been her neighbor in Brownville for thirty-four years, she had remarked that her property would not go to relatives, but in another direction. A few days subsequent to the making of the will, to-wit, on February 5, she visited the last-named witness at his home in Lincoln *en route* to Hot Springs, South Dakota. Learning that the witness was contemplating a trip to southern Texas in company with a number of friends, including several state officers and their families, she expressed a desire to join the party, which she did, and was absent ten or twelve days. Of the persons who accompanied her on that trip several, including Mr. Hill, state treasurer, Mr. Allen, secretary of state, and the witness Johnson testify that she was in excellent health and spirits, and from all appearances perfectly sane. It is also disclosed by the evidence that she had had other business transactions with Judge Stull and his partner about the time in question, as appears from the following testimony of the latter :

I was acquainted with her a short time only, before the making of the will. We had been doing a little business with her.

Q. How did she transact business?

A. Usually in person.

Q. When she came to the office did she come alone?

A. I do not remember that she ever came with any one. She was always alone when she came to the office to transact business. She came as an ordinary person would, and I saw nothing out of the way that would indicate insanity or anything of the kind.

Conceding all that is claimed for the testimony of the witness Mrs. Smith, it fails to establish the connection between the will and the alleged supernatural manifestations.

But the judgment must be affirmed on other and more substantial grounds. On all subjects except the one above alluded to the testatrix was mentally sound. Indeed, her general sanity is not seriously called in question. The proposition presented by the record is that with respect to the one subject she was laboring under a delusion which controlled her actions in the disposition of her property. Volumes would be required for even a summary of what has been said and written on the subject. In fact, no topic has occasioned a more animated discussion or given rise to a greater diversity of opinion than this particular phase of the problem of insanity. Eminent authority of comparatively recent date, including Lord Brougham, have regarded the human mind as a single indivisible potency not comprising distinct functions, and consequently any impairment thereof must be absolute and not partial. (Mann, Medical Jurisprudence of Insanity, 159.) But from the various opinions there have been evolved certain accepted rules, which are especially applicable to the case at bar, viz.: (1.) Mere eccentricity of belief is not conclusive evidence of a want of testamentary capacity, provided there is no delusion respecting matters of fact connected

with the making of the will or the objects of the testator's bounty. (2.) Where the testator's mind is not so controlled by his peculiar views as to prevent the exercise of a rational judgment in the disposition of his property the will should be sustained, however absurd or irrational such views may be. (3.) Where the testator is not claimed to have been generally insane, but controlled by insane notions, the question to be determined is whether he was the victim of such delusions as controlled his action and rendered him insensible to the ties of blood and kindred? (See *Cassady, Wills*, 478; *Beach, Wills*, sec. 102; *Spratt v. Spratt*, 76 Mich., 384; *Frazer v. Jennison*, 42 Mich., 206; *Rice v. Rice*, 50 Mich., 448; *Smith v. James*, 72 Ia., 515; *Lee v. Scudder*, 31 N. J. Eq., 633; *Middleditch v. Williams*, 45 N. J. Eq., 726; *In re Tritch's Will*, 30 Atl. Rep. [Pa.], 1053; *Potter v. Jones*, 20 Ore., 239; 1 Redfield, *Wills*, p. 90*.)

The foregoing are selected from among the many authorities which sustain the principle above stated, and are believed to embody the law of the subject. A reference to the will itself fails to disclose any evidence of mental incapacity on the part of the testatrix or to suggest that she was controlled in any degree by her imaginary communication with the spirit of her deceased husband or others; nor can the disposition thereby made of her property be said to be unnatural or unreasonable in view of her relation to the principal beneficiary, and the further fact that she inherited said property, not through her own family, but from her husband. Again, we find in the record no evidence tending to prove that the alleged spirits, through their communications with the testatrix, tended to prejudice her mind directly or indirectly against the contestants or in favor of the Home for the Friendless. In fact, any conclusion with respect to the substance even of such communications must rest entirely upon conjecture. Law, it is said, is "of the earth, earthy" and that spirit-wills are

too celestial for cognizance by earthly tribunals,—a proposition readily conceded ; and yet the courts have not assumed to deny to spirits of the departed the privilege of holding communion with those of their friends who are still in the flesh so long as they do not interfere with vested rights or by the means of undue influence seek to prejudice the interests of persons still within our jurisdiction. There was, it should be noted, evidence given tending to prove that Mrs. Scott, the mother of the parties hereto, was also a victim of a certain form or type of insanity ; but since, as in the case of the testatrix, her sanity was never called in question until about the time of the proof of this will even among her most intimate friends and acquaintances, we think the action of the jury in rejecting all such evidence not so unwarranted as to call for a reversal on that ground.

Another assignment is the recalling of the jury after the submission of the cause and the giving of a further instruction in the following language: "The court instructs the jury that influence to violate a will must be such as to amount to force and coercion, destroying the free agency of the testator, and there must be proof that the will was obtained by this coercion, and it must be shown that the circumstances of its execution are inconsistent with any theory but undue influence, which cannot be presumed, but must be proved in connection with the will and not with other things." The recalling of a jury for instructions is a matter so far within the discretion of the court as not to present a subject for review, assuming, of course, that the attending circumstances do not show an abuse of discretion and that the instructions given embody the law of the case.

The real criticism of the instruction in this case appears from the following quotation from the brief of contestants: "Insane delusion is not undue influence in any sense, and no question of undue influence was raised or submitted to the jury. The instruction complained of has no application to any issue submitted to the jury, and that it was de-

cisive of the jury's verdict is shown by the fact that immediately after the same was given, the jury returned into court a verdict for the proponents." We are not prepared to assent to the proposition that no issue of undue influence was presented by the pleadings. It is, as we have seen, alleged by contestants that "the pretended will is the result of an insane delusion existing in the mind of the testatrix," etc., and therefore, void. It has been held by eminent authority that the ground of relief in such cases is not, strictly speaking, the insanity of the testator but that of undue influence in the execution of the will. (See *Thompson v. Hanks*, 14 Fed. Rep., 902; Mann, *Medical Jurisprudence of Insanity*, 165.) But assuming the converse of the proposition just stated to be true, the instruction is, at most, error without prejudice, since its effect was merely to impose upon the prevailing party an additional and unnecessary burden. This court has frequently condemned the practice of submitting to the jury by way of instructions questions not presented by the issues, but we are not aware that a judgment has ever been reversed on that account, where it is apparent from the record that the action of the court could not have prejudiced the rights of the complaining party. It is, on the other hand, the settled practice of this court to disregard harmless error at whatever stage of the proceeding it is shown to have occurred.

There remains to be considered the claim of the contestants for an allowance out of the estate of the deceased on account of costs and attorney's fees. Their reliance, so far as that contention is concerned, is upon the case of *Seebrock v. Fedawa*, 33 Neb., 413. Courts of equity have frequently assumed, when dealing with funds brought directly within their control, to order payment therefrom of fees to counsel for the adverse party. That practice had its origin in the theory that such a proceeding is primarily for the purpose of securing the direction of the court with respect to the disposition of a particular fund, and is there-

McClary v. Stull.

fore alike beneficial to all parties concerned. Equitable proceedings for the construction of wills may be said to be within the rule above stated, and were evidently so regarded by this court in *Seebrook v. Fedawa*, 33 Neb., 413; but an examination of the record discloses a distinction between that case and the one before us in two essential respects. In the first place, John C. Ward, one of the contestants, in a sworn affidavit, deposes that he has communicated with counsel for the other contestants on the subject of their fees and expenses and has been assured by them that they have a written agreement whereby they are to receive twenty per cent of the amount realized by contestants out of the estate of the deceased as full compensation for their services. That statement is met by the affidavit of Mr. Burnham, who is referred to by Mr. Ward as his informant, in the following language: "This affiant never entered into a written contract with Miranda J. McClary, or any other of the contestants, regarding fees, and no such contract exists or ever did exist." Referring to Ward's affidavit, counsel for contestants dismiss the subject with the remark that the arrangement with their clients regarding compensation for their services is no concern of the proponents, since questions of like character can be raised only in controversies between attorney and client. In support of that proposition we are referred to *Omaha & R. V. R. Co. v. Brady*, 39 Neb., 48. That case would be conclusive if the proponents were seeking to interpose the alleged agreement as a defense to the merits of the cause; but the question presented is altogether different, since counsel are seeking not satisfaction for their clients, but compensation for themselves out of funds belonging to the adverse party. The evidence referred to tends to prove that they relied upon a specific agreement with them. Equity will not permit them to claim the fruits of an advantageous agreement in case of a favorable result of the litigation, and at the same time insist upon compensation out of the fund in

controversy in case of a result adverse to the claim of their clients. The question at issue is the agreement between counsel and contestants, rather than the evidence thereof, and the denial of a written agreement cannot be said to be responsive to the statements of the affidavit. Precedents, so far as our examination has extended, tend to sustain the position of the proponents on this branch of the case. In *re Titlow's Estate*, 29 Atl. Rep. [Pa.], 758, the contestant, a disinherited child, after a judgment in his favor in the trial court, compromised with those claiming adversely whereby the will was sustained. It was held that the fees of the contestant's attorneys could not be paid out of the estate, and as identical in principle see *West v. Place*, 23 N. Y. Sup., 1090; *Wilson's Will*, 103 N. Y., 374. This case is distinguishable from *Seebrook v. Fedawa* on other and more substantial grounds, viz., the attack upon the will in the district court and also in this court is particularly directed against the provision thereof in favor of the Home for the Friendless. But the validity of that bequest, as we have seen, is not involved in this proceeding. It is possible that in a subsequent proceeding for the construction of the will in order to determine the validity of that provision the interests of the beneficiaries and the heirs may be found to be so far mutual as to warrant the payment of expenses out of the estate; but upon the record presented we must decline to interfere in behalf of counsel. The judgment of the district court is accordingly

AFFIRMED.

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54	112
44	194
56	419

WESTERN UNION TELEGRAPH COMPANY V. D. KEMP.

FILED MARCH 5, 1895. No. 6479.

1. **Telegraph Companies: STATUTORY LIABILITY.** The provisions of section 12, chapter 89a, Compiled Statutes, in reference to telegraph companies and their transmission of dispatches, whereby any such company is made "liable for the non-delivery of dispatches entrusted to its care and for all mistakes in transmitting messages made by any person in its employ, * * * shall not be exempted from any such liability by reason of any clause, condition, or agreement contained in its printed blanks," are not inequitable and are obligatory upon all telegraph companies in the state.
2. ———: ———: **INCORRECT MESSAGES.** Defendant in error delivered a message written on one of the company's forms, to its agent at its office in a town in this state, to be transmitted to Kansas City, Missouri, to be there delivered to a person to whom it was addressed, which was so changed in its transmission, in a material portion, as to contain incorrect information, by reason of which the sender suffered damages. *Held*, That the company was liable for the damages caused by the mistake in sending the message, and could not limit its liability to the amount received by it for sending the dispatch.
3. ———: ———: **PRESENTMENT OF CLAIM: INVALID LIMITATION.** On the message form used by a telegraph company was printed the following stipulation: "The company will not be liable for damages in any case where the claim is not presented in writing within sixty days after sending the message." *Held*, That it thereby aimed to limit its liability, and that this clause, if intended as a contract, or if viewed as such, was unfair and in violation of the provisions of section 12, chapter 89a, Compiled Statutes. *Pacific Telegraph Co. v. Underwood*, 37 Neb., 315, followed.

ERROR from the district court of Madison county.
Tried below before ALLEN, J.

Estabrook & Davis, for plaintiff in error, cited, contending that the sixty-day limitation was reasonable and valid: *Sherrill v. Western Union Telegraph Co.*, 109 N. Car., 527;

Young v. Western Union Telegraph Co., 65 N. Y., 165; *Massengale v. Western Union Telegraph Co.*, 17 Mo. App., 259; *Cole v. Western Union Telegraph Co.*, 33 Minn., 227; *Hill v. Telegraph Co.*, 85 Ga., 425; *Western Union Telegraph Co. v. Dunfield*, 11 Col., 335; *Lester v. Western Union Telegraph Co.*, 84 Tex., 313; *Western Union Telegraph Co. v. Culberson*, 79 Tex., 65; *Western Union Telegraph Co. v. Rains*, 63 Tex., 27; *Heimann v. Western Union Telegraph Co.*, 57 Wis., 564; *Wolfe v. Western Union Telegraph Co.*, 62 Pa. St., 83; *Southern Express Co. v. Caldwell*, 21 Wall. [U. S.], 264; *Western Union Telegraph Co. v. Jones*, 95 Ind., 228; *Western Union Telegraph Co. v. Meredith*, 95 Ind., 93; *Western Union Telegraph Co. v. Fairbanks*, 15 Brad. [Ill.], 601; *Western Union Telegraph Co. v. Way*, 83 Ala., 542; *Western Union Telegraph Co. v. Dougherty*, 15 S. W. Rep. [Ark.], 468; *Western Union Telegraph Co. v. James*, 15 S. E. Rep. [Ga.], 83; *Western Union Telegraph Co. v. Yopst*, 118 Ind., 248; *Western Union Telegraph Co. v. Trumbell*, 27 N. E. Rep. [Ind.], 312; *Beasley v. Western Union Telegraph Co.*, 39 Fed. Rep., 181; *Western Union Telegraph Co. v. Brown*, 19 S. W. Rep. [Tex.], 336.

H. C. Brome and Richard A. Jones, also for plaintiff in error.

Reed & Ellis, contra.

HARRISON, J.

This action was commenced in the district court of Madison county by the defendant in error to recover damages against plaintiff in error which he alleged were caused by the incorrect transmission of a message from Papillion, this state, to Kansas City, Missouri, delivered by him to the company at its place of business in the former place to be sent to the latter. A jury was waived in the district court and the case submitted to the judge thereof upon a stipulated statement of facts, and from a finding and judgment

in favor of defendant in error these proceedings have been prosecuted to the higher court.

This case was before this court prior to this time for review of the proceedings during the trial to a judge of the district court and a jury, and was reversed and remanded for further action. The opinion rendered at that time is reported in 28 Neb., at page 661. The statement of the issues and facts therein made is sufficiently full and complete, hence we do not deem it necessary to repeat it, but for such statement we here refer to that opinion. It was announced in that decision that the requirements embodied in section 12 of chapter 89a, Compiled Statutes, as follows: "Any telegraph company engaged in the transmission of telegraphic dispatches is hereby declared to be liable for the non-delivery of dispatches entrusted to its care, and for all mistakes in transmitting messages made by any person in its employ, and for all damages resulting from a failure to perform any other duty required by law, and any such telegraph company shall not be exempted from any such liability by reason of any clause, condition, or agreement contained in its printed blanks,"—are equitable and fair and obligatory on any and all telegraph companies doing business in this state, and that any such company contracting to correctly send a message to another state, which incorrectly transmits the same, is liable in all the damages for the breach of its contract which are sustained by the sender of the message by reason of such breach, and that, applied to the facts in this case, the defendant in error having delivered the message to the company at its office in Papillion, to be sent in the regular course of its business to Kansas City, Missouri, and the company's operator or agent, having transmitted it incorrectly in material portions, whereby defendant in error suffered damages, the company was liable for such damages. The determination of these questions, as stated in the former opinion, will not now be changed, but will be followed and adhered to.

The only other point discussed in the brief of plaintiff in error and for decision in the present hearing and which was not urged or passed upon at the prior presentation of the case in this court is that one of the agreements or conditions printed on the form upon which the defendant in error wrote his message was as follows: "The company will not be liable for damages in any case where the claim is not presented in writing within sixty days after sending the message;" that the sender was bound by the stipulation quoted and, as the facts do not show that he did present his claim in writing to the company within the sixty days therein prescribed, he should not have been allowed a judgment for the damages. A clause such as this particular clause of the stipulations printed upon the form in which the message was written was considered by this court in the case of *Pacific Telegraph Co. v. Underwood*, 37 Neb., 315, and it was then held that if this portion of the conditions printed upon the telegraphic message form was to be looked upon as a contract, it was in violation of section 12, chapter 89a, Compiled Statutes, and an attempt to limit the liability of the company in a manner which the law did not allow. We are satisfied with the rule announced at that time and will adhere to it. It follows that the judgment of the district court will be

AFFIRMED.

ESTHER AMELIA BARR V. JOHN M. BIRKNER.

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47	374

FILED MARCH 5, 1895. No. 6254.

1. **Slander: WORDS ACTIONABLE PER SE.** Words spoken of a woman which falsely charge that she is a prostitute are actionable *per se*, and in an action of slander against the person who made such a charge it is not necessary to either allege or prove special damages in order to maintain the action.

2. ———: PLEADING. Where it is alleged in a petition that defendant spoke certain words of the plaintiff and their meaning is averred in an innuendo, a statement in the answer by which the defendant admits the uttering of the words as alleged, but further states "that it was not in the sense of nor with the intent to convey the idea" claimed in the petition, is not a denial that the words had the signification averred in the petition.
3. ———: ERRONEOUS DIRECTION OF VERDICT. The action of the trial judge in instructing the jury to return a verdict for the defendant examined, and held not warranted by the issues as shown by the pleadings in connection with such proof as was introduced, and erroneous.

ERROR from the district court of Clay county. Tried below before HASTINGS, J.

Thomas H. Matters, for plaintiff in error:

The answer was a substantial confession of the averments of the petition and offered no matter of defense. (*Farrar v. Triplett*, 7 Neb., 240; *Dinsmore v. Stimbert*, 12 Neb., 434; *Douglass v. Matting*, 29 Ia., 498; *Kennedy v. McLaughlin*, 5 Gray [Mass.], 3; *Clark v. Munsell*, 6 Met. [Mass.], 373; *Haskins v. Lumsden*, 10 Wis., 302; *Moberly v. Preston*, 8 Mo., 463; *Hampton v. Wilson*, 4 Dev. [N. Car.], 468; *Knight v. Foster*, 39 N. H., 576; *Wolcott v. Hall*, 6 Mass., 514; *Alderman v. French*, 1 Pick. [Mass.], 1; *Wheeler v. Shields*, 2 Scam. [Ill.], 348; *Clark v. Brown*, 116 Mass., 504; *Moore v. Stevenson*, 27 Conn., 14; *Wilson v. Fitch*, 41 Cal., 364; *Daly v. Byrne*, 1 Abb. N. C. [N. Y.], 150; *Littlejohn v. Greeley*, 13 Abb. Pr. [N. Y.], 55; *Townsend, Slander & Libel*, 132, 352, 353, 357, 374, 600, notes and cases cited.)

The court should have directed a verdict for plaintiff. (*Townsend, Slander & Libel*, 234, 352, 353, 354, 600, and cases cited; *Gorham v. Ives*, 2 Wend. [N. Y.], 534; *Hotchkiss v. Oliphant*, 2 Hill [N. Y.], 510; *Dinsmore v. Stimbert*, 12 Neb., 434; *Douglass v. Matting*, 29 Ia., 498; *Daly v. Byrne*, 1 Abb. N. C. [N. Y.], 150; *Parkhurst v.*

Barr v. Birkner.

Ketchum, 88 Mass., 406; *Inman v. Foster*, 8 Wend. [N. Y.], 602; *Kennedy v. Gifford*, 19 Wend. [N. Y.], 296.)

L. P. Crouch and E. E. Hairgrove, contra.

HARRISON, J.

The plaintiff commenced an action of slander against the defendant in the district court of Clay county, in which she filed the following petition:

"The plaintiff representing unto this honorable court sets forth that she is now, and has been for more than two years last past, a resident of Clay county, Nebraska, and that during her residence in Clay county she has been engaged in the business of keeping a hotel in the city of Sutton in said county.

"2. That the defendant is a physician and surgeon duly qualified under and by virtue of the laws of the state of Nebraska to practice medicine.

"3. That during the whole time of her residence in Clay county, Nebraska, up to the 15th day of April, 1892, this plaintiff employed said defendant as her family physician.

"4. That during all of said time said defendant waited upon the plaintiff in the capacity of a physician, and was or should have been under and by virtue of his position as physician of this plaintiff fully acquainted with all the ailments of whatsoever kind or nature with which the plaintiff was afflicted.

"5. The plaintiff desires more fully to show that notwithstanding the knowledge within the mind of the defendant regarding this plaintiff during the month of April, 1892, said defendant, wickedly intending to injure the plaintiff in her good name, in a certain discourse which he then had of and concerning the plaintiff in the presence and hearing of divers persons, falsely and maliciously did speak and publish the following false and defamatory words, that

is to say: 'There is a new landlord at the Occidental Hotel,' or words to that effect, meaning that the plaintiff had been delivered of a bastard child. And again in the hearing of divers persons the defendant falsely and maliciously did speak and publish the following false and defamatory words, that is to say: 'I knew that she was in that condition in January last,' meaning that he knew that the plaintiff was pregnant with a bastard child in January, 1892, and said defendant, in the presence and hearing of divers persons during said time, did falsely and maliciously, by innuendoes and insinuations, circulate the report of and concerning this plaintiff that she was pregnant with a bastard child, and later that she had been delivered of a bastard child, and at the time of making such insinuations and the making of said statements the said defendant knew them to be false and untrue in every particular, having been in constant employ of this plaintiff as her physician, and there was within his mind absolute knowledge of the falsity of said statements.

"6. The plaintiff further representing unto this court shows that said defendant, in the presence and hearing of divers persons in the month of April, 1892, in a certain discourse which he then had of and concerning the plaintiff in the presence and hearing of divers persons, did falsely and maliciously speak and publish the following false and defamatory words, that is to say: 'She is an old cat,' meaning that the plaintiff was a prostitute.

"7. The plaintiff further says that said defendant, during said months of April and May, gave circulation to the report that this plaintiff was a woman who is unchaste and impure, and that she is a common prostitute; that each and every one of said statements were made falsely and maliciously and wickedly for the purpose of injuring the plaintiff in her good name, by means of which said several premises the plaintiff has been greatly injured in her good name to her damage in the sum of \$5,000."

To this the defendant filed an answer in which he admitted the statements made in the first and second paragraphs of the petition, and further states:

"2. And further answering the said petition of plaintiff, defendant alleges that he did not use the alleged supposed defamatory words, 'There is a new landlord at the Occidental Hotel,' but that he did use instead the following, to-wit: 'Have you heard the report of there being a new landlord at the Occidental Hotel;' that the said language so used by the defendant as aforesaid, and as above set out, was used by him with reference to and concerning the alleged supposed fact that plaintiff had given birth to a child, and was the same occurrence as that alluded to by the innuendo set out in plaintiff's petition, to the form of expression as in the said petition contained.

"3. The defendant herein alleges that the truth and facts in connection with and in regard to his use of the words above set out, his reason therefor, the circumstances under which they were spoken, the spirit in which they were uttered and spoken, and the grounds therefor, and all the matters and things connected therewith are as follows: The hotel referred to and mentioned in plaintiff's petition, and included in the supposed defamatory words aforesaid, was and is the Occidental Hotel in said city of Sutton, Clay county, and state of Nebraska; that the proprietors thereof, at the date of the offense charged against this defendant in plaintiff's said petition, and for a long time prior thereto and also at the present time, is a firm under the firm name and style of J. R. Shope & Co.; that the persons composing the said firm are J. R. Shope and this plaintiff; that each of said proprietors, from the time they first took possession of the said hotel until and including the present time, have represented and held themselves out to the public as single persons; that from the time the said proprietors first took possession of the said hotel they have run, used, and conducted it as a hotel for the accommoda-

tion of the traveling public, furnishing board and lodging for the same, and meals to all who might apply, and furnishing private boarding,—in a word, doing the business that the public would expect a hotel to do, and which is in the line of business of a hotel.

“4. That for a long prior to the date of the alleged offense against this defendant reports obtained circulation in the community from time to time adverse to the virtue and chastity of this plaintiff; that these reports formed topics for general remarks in the community in which the plaintiff resided and was doing business; that these reports were commented on, talked about, and canvassed by different classes of people in the community, both male and female; that these reports, by numbers in the community, came to be believed as true; that they cast a shadow of suspicion on the hotel, affected its business and the social standing of this plaintiff in the community in which she resided.

“5. That late in the fall of 1891, the date of which defendant cannot now recollect, plaintiff withdrew herself from the public and from the public sight, secluded herself from the public gaze and was hid from the public eye in the seclusion of her own private apartments within the said hotel; that this retirement of the said plaintiff into the privacy of her own apartments continued up to a short time following the date of the alleged offense plaintiff charges against defendant in her said petition, when she emerged from her long enforced retirement and again appears on the street and resumes her former habits; that during a part of plaintiff's said retirement she employed by turns the resident physicians to attend upon her in their professional capacity, but toward the close of her said retirement she dispensed with their further service and called in foreign medical aid and service; that her said retirement and seclusion as aforesaid gave rise to public rumor, surmise, and suspicions as to the reason and cause therefor; that the same

became a topic of frequent remark and criticism in the community by all classes of people, both male and female; that the said suspicion and surmises, preceded by the reports hereinbefore mentioned, took formal shape in such remarks as this: 'There must be something wrong at the Occidental Hotel,' the purport of which remark was that the said plaintiff must be pregnant; that the said remark on the part of all classes was frequent, and the truth of which obtained credence among a large number of persons, while a suspicion that it might be true was general among others.

"6. That some time in the early part of the month of April, 1892, the exact date defendant cannot now recall, defendant learned for the first time of a report in circulation to the effect that plaintiff had in the early morning of said day given birth to a child; that defendant found that by evening of the same day the said report had become the topic of general remark on the street; that defendant was repeatedly asked as he circulated among the people on the street if he had heard that 'There is a new landlord at the Occidental Hotel;' that defendant in turn asked the same question of other persons; that the said report was in everybody's mouth; that the various reports and rumors in circulation adverse to the chastity of this plaintiff, together with the seclusion of plaintiff from the public, all of which are more particularly set out above, were well known to defendant at the time of their existence, and in consequence and as a result thereof defendant believed that plaintiff had given birth to a child as alleged by the report in reference thereto.

"7. Further answering the petition of plaintiff the defendant alleges that in regard to the other supposed defamatory words alleged by plaintiff in her said petition to have been used by defendant, to-wit, 'I knew that she was in that condition in January last,' that he has no recollection of using the said language, but if he did, it was not in

the sense of his having absolute knowledge of the truth of the said words, for such knowledge he did not have; but if he did use them, it was in the sense that from the matters and things above set out as relating thereto he believed that they were true; that his said belief in the fact of plaintiff's said pregnancy was based on the said reports and the said seclusion of plaintiff from the public, as hereinbefore more fully made to appear.

"8. Further answering the petition of plaintiff in regard to other supposed defamatory words alleged by plaintiff to have been used by defendant of and concerning the said plaintiff, to-wit, 'She is an old cat,' says with reference thereto that he has no recollection of using the said words, but if he did use them it was not in the sense of, nor with the intent to, convey the idea that the said plaintiff was a prostitute.

"9. The defendant alleges that he has not at any time given circulation to the report that plaintiff was a woman who is unchaste or impure, or a common prostitute; that he has made no effort, sought no opportunity, availed himself of no occasion, nor in any other way has he sought, attempted, or tried to circulate any such report, nor has he done so; that all he has done in that regard is to talk about the said reports as every man and woman in the community has done in which plaintiff resides, as the subject might come up in conversation, and of his belief of their truth.

"10. The defendant alleges that in whatsoever he has said of and concerning the said reports about and concerning plaintiff he has done so without malice, and with no intent to injure either the business or the reputation of the said plaintiff."

There were some further allegations of the answer which were mainly repetitions of what had been before stated, and the answer closed with a denial that the plaintiff had been damaged in any manner or in any amount. The reply was as follows:

"1. Now comes the plaintiff, and replying to the answer of the defendant herein filed says: That she denies each and every allegation therein contained except such as are hereinafter admitted.

"2. Plaintiff admits that the hotel referred to in her petition is the 'Occidental Hotel;' that the proprietors do business under the firm name of J. R. Shope & Co.; that the partners composing said firm are J. R. Shope and this plaintiff; that they are single persons; that ever since they took possession of said hotel they have run it for the accommodation of the traveling public and local patrons; that the report circulated, canvassed, commented upon, and talked about, as set forth in the fourth count of the defendant's answer, are the reports and conversations of and concerning which this plaintiff complains to this court, and they were put in circulation and given circulation by the defendant, and she admits that they affected the business of the hotel and the social standing of the plaintiff.

"3. Plaintiff further says that in the fall of 1891, she being afflicted by the menopause of life, became weak and at times unable to perform her household duties, and called upon the defendant, as a physician, to treat her ailments, whatever they might be, and the defendant, after long and continuous trials to relieve this patient of her sufferings, plaintiff saw fit to call upon Dr. Lee, now of Beatrice, Nebraska, but formerly of Sutton, Nebraska, who seemed to understand her case, and under his care and treatment her health became greatly improved, so much so that she was again able to resume her household duties, and for this reason only was the defendant induced to make his vile and slanderous assertions set out in plaintiff's petition herein filed and consented to in defendant's answer.

"4. Plaintiff further says that the facts set out in defendant's answer constitute no defense to the cause of action of the plaintiff herein, wherefore said plaintiff prays that the prayer of her said petition be granted."

Our reason for copying the pleadings is that the disposition which must be made of the case in this court rests almost, if not entirely, on the conclusion to be reached from a determination of the conditions of the issues as fixed by the pleadings. When the case was called for trial a jury was impaneled and the plaintiff was called to the witness stand, and after a few preliminary questions had been asked and answered the answer of defendant was offered in evidence. As to this the following statements appear in the record.

"The plaintiff now offers in evidence the answer of the defendant John Martin Birkner. The same is received and marked 'Plaintiff's Exhibit 1.'

"Defendant objects to the introduction of the same, as incompetent, irrelevant, and immaterial. Overruled. Exception.

"Court: You may read any part you desire in the case, and read it when you please."

The examination of plaintiff was then continued, but without obtaining much, if any, testimony which in any manner or to any very appreciable extent or degree tended to support the allegations of the petition except to show that reports such as set forth in the answer were in circulation in the community regarding plaintiff and that they had probably, to some extent, affected the social standing of plaintiff unfavorably. The answer, if introduced in evidence, does not appear in the bill of exceptions as a part of the testimony thereby preserved and cannot be considered as a part of the evidence in the case or bearing upon the issues except as it must be considered in its statements as a pleading, as admitting or denying the allegations of the petition, and thus requiring as to some of them, or rendering unnecessary as to others, any proof by plaintiff of the truth of such allegations. There was no cross-examination of the plaintiff and no other witness was called or testimony offered by or in behalf of either party, and at the close of her testimony the defendant made a motion to the

effect that the court instruct the jury to find for the defendant, which motion the court sustained and instructed the jury as follows: "Gentlemen: It appears to the court that plaintiff has produced no proof upon which you would be justified in finding a verdict for the plaintiff. You will therefore render a verdict in this cause for defendant." This action of the court was duly excepted to by counsel for plaintiff and was made one of the grounds of the motion for a new trial filed on behalf of plaintiff and is assigned as error in the petition in this court. There was a verdict in accordance with the direction of the court and judgment thereon for defendant.

The main question to be considered, and upon which hinges the determination of the disposition to be made of the case in this court, is whether the defendant, by some admissions made in his answer, and failure to deny therein some allegations of the petition, rendered it unnecessary for the plaintiff to produce proof of such facts, or is his liability, at least to some extent, shown sufficiently by the pleadings alone? The counsel for plaintiff contends that this is true, and being true, it was error for the court to instruct the jury as it did, to return a verdict for the defendant. The answer contains a denial that the defendant used the words, "There is a new landlord at the Occidental Hotel," and further states that he did use other words in speaking of the same matter, setting out such other words in full. The words the defendant says he used were not a direct statement, but were in an interrogative form and referred to the report of an occurrence and not to the subject itself, and proof of a statement of what the defendant pleads in his answer as being the words used would not have been sufficient to sustain a charge of speaking those alleged in the petition. "It is well settled that to authorize a recovery in an action for slander, the words laid in the declaration, or enough of them to charge the particular offense alleged to have been imputed, must be proved substantially as

charged. Evidence of the speaking of equivalent words, although having the same import and meaning, is not admissible. And words spoken interrogatively are not admissible to sustain an allegation of words spoken affirmatively." (*Sanford v. Gaddis*, 15 Ill., 228; *Wilborn v. Odell*, 29 Ill., 457; *Ransom v. McCurley*, 31 N. E. Rep. [Ill.], 119.) "In an action of slander the words charged and the words proved must be substantially the same; that they both convey the same idea is not sufficient to sustain the action." (*Bundy v. Hart*, 2 Am. Rep. [Mo.], 525; *Berry v. Dryden*, 7 Mo., 324; *Birch v. Benton*, 26 Mo., 163.) It follows that the statement of the words really used was not an admission of the ones claimed to have been spoken, and that proof of those pleaded was necessary under the denial of their use, contained in the answer.

In the sixth paragraph of the petition it was alleged that in the month of April, 1892, the defendant, in the presence and hearing of divers persons, did falsely and maliciously speak and publish of and concerning the plaintiff the following false and defamatory words, "that is to say: 'She is an old cat,' meaning that the plaintiff was a prostitute." The defendant's answer to this is "that he has no recollection of using the words, but if he did use them it was not in the sense of, nor with the intent to, convey the idea that plaintiff was a prostitute." He does not deny that he used the words stated or that they had the meaning alleged and conveyed such meaning to the persons hearing them, or to whom they were spoken. His answer to this allegation of the petition, aside from the admission it contains, is an allegation that he had an intent and used the words spoken with a meaning different from the one which the petition alleges they had and conveyed at the time and to the parties hearing them, and that he had a secret intent and meaning for the words. This is not a denial that they had the meaning to the by-standers when spoken, which the petition states they had, and to be available to the defendant as a de-

fense it would be necessary that it be shown that from the drift of the conversation, or what had been said and done at the time the words were spoken, or the facts and circumstances connected with the conversation or its subject-matter that they had such a bearing upon the import of the words as to limit the meaning conveyed to the hearers, to that entertained by the speaker of them. In the absence of such a showing, the fact that he had such intent and meaning at the time of uttering the words is immaterial. (Folkard's Starkie, Slander & Libel, secs. 591, 592; Moak's Underhill, Torts, pp. 139, 140; *Maybee v. Fisk*, 42 Barb. [N. Y.], 327; *Sabin v. Angell*, 46 Vt., 740.) It being admitted in the answer that the defendant had spoken of the plaintiff the words alleged, and not denied that their meaning was as claimed, this was in effect admitting that defendant had circulated the report that plaintiff was a prostitute, and no proof on this branch of the case was necessary on the part of plaintiff to entitle her to a verdict for at least nominal damages, for this was such a charge against her as was actionable in such a sense that when proved, or as in this case admitted to have been made, entitled her to damages, nominal damages at least being presumed without any further proof. (Cooley, Torts, 196; Townsend, Slander & Libel, 146, 147; *Boldt v. Budwig*, 19 Neb., 739; *Edwards v. Kansas City Times Co.*, 32 Fed. Rep., 813; *Hendrickson v. Sullivan*, 28 Neb., 329.) That other persons had said, or were saying the same, or that such a report was prevalent, or that what defendant had said was merely repeating what he had heard other persons say, would not excuse him from liability. (Cooley, Torts, 220 and cases cited; Folkard's Starkie, Slander & Libel, sec. 405.)

It follows that the action of the court in instructing the jury to return a verdict for defendant was wrong, and the judgment of the district court is reversed and the cause remanded.

REVERSED AND REMANDED.

44	210
50	788
44	210
56	454

ORTHA C. BELL, RECEIVER, v. ROBERT K. STOWE ET AL.

FILED MARCH 5, 1895. No. 6454.

1. **Usury: PLEADING.** To constitute a plea of usury there must be a statement of the contract claimed to be usurious, with whom it was made, its terms and character, and the amount of interest agreed upon to be reserved, taken, or received.
2. ———: **ADMISSION OF TESTIMONY.** The rulings of the trial judge in admitting certain testimony *held* erroneous.
3. ———: **EVIDENCE.** The finding of the jury and verdict in this case *held* to be manifestly wrong and not sustained by the evidence.

ERROR from the district court of Douglas county. Tried below before HOPEWELL, J.

John O. Yeiser, for plaintiff in error.

Blair & Goss, contra.

HARRISON, J.

The plaintiff in error, also plaintiff below, instituted this action in the district court of Douglas county to obtain judgment against the defendants for the sum of \$1,231.66, together with interest thereon at ten per cent per annum from August 16, 1891. The claim for such judgment was based upon a promissory note of date May 16, 1891, due ninety days after date, and in the amount claimed, alleged in the petition to have been executed and delivered by defendants to the bank of which plaintiff afterwards was appointed receiver. The answer, in so far as we need particularly notice it here, was as follows:

“3. That when these defendants made the contract with the First National Bank of Red Cloud, Nebraska, as shown in and evidenced by said note, set out in the petition, said bank contracted for an unlawful rate of interest thereon, and

contracted for and took usury thereon, to-wit: These defendants were on said May 16, 1891, indebted to said bank in the sum of \$578.63, and no more, and on said day, and without any other and further consideration whatsoever, they made and delivered to said bank, at its request, the aforesaid note of \$1,231.66, and that said note is the sole and only evidence of the indebtedness of these defendants to said bank, and that by said note the said bank took and contracted for usury to the amount of \$653.03.

"4. That these defendants are indebted to said bank in the sum of \$578.63, and no more, which said sum these defendants are willing and ready to pay."

The reply was in the following words:

"Plaintiff for reply to defendants' answer denies that it contracted for or took any unlawful rate of interest or usury as alleged by defendants, and denies every allegation of new matter contained in defendants' answer."

A trial to the court and a jury resulted in a verdict for the plaintiff in the sum of \$578.63, which was in reality a victory for defendants, it being for the amount they pleaded in the answer they were indebted on the note, after deducting an alleged usurious amount from the face of the note. Plaintiff filed a motion for a new trial, which, on hearing, was overruled and judgment was rendered on the verdict.

The trial judge, in his certificate to the bill of exceptions, makes the following statement with reference to a portion of the case, viz.: "The defendants, although having the affirmative, requested plaintiff to introduce the original note sued upon, which was consented to." And in the transcript of the record appears an admission of certain facts which were alleged in the petition and denied in the answer, and the portion of the proceedings alluded to by the judge in his certificate to the bill of exceptions. It is as follows:

"The defendants admit that this First National Bank of Red Cloud was duly incorporated and is now in the hands

Bell v. Stowe.

of a receiver; that plaintiff, Mr. Bell, is the receiver of this bank now in liquidation, and that the bank went into liquidation on the 21st day of May, 1891.

"Note identified as Exhibit 'A' by plaintiff.

"Note, Exhibit 'A,' which is copied in plaintiff's petition offered in evidence.

"Plaintiff rests."

Robert K. Stowe, one of the defendants, was called and testified in behalf of defendants, he being the only person who testified during the trial. The evidence of Stowe was mainly, if not entirely, confined to an attempt to show that he had commenced borrowing money of the bank August 31, 1887, and at that time executed a note as evidence of debt created by the loan to him; that the contract made between him and the bank was a usurious one, and that from that time until the execution and delivery of the note in suit there had been a continuous transaction between them, of the same nature, and evidenced from time to time by notes and renewal notes, the note in suit being the last of the series and given by him for the amount or balance due as a result of the whole account and dealings between the parties. To almost every one of the number of questions asked of the witness for the purpose of showing the business transactions which had taken place between him and the bank during a number of years prior to the execution of the note in suit, in which he had been a borrower and the bank a lender, and the usurious character thereof and that it was included in the note upon which the action was brought, the plaintiff objected as being incompetent, immaterial, and irrelevant, which was in almost, if not every instance overruled by the trial judge and the evidence received. Exception was taken to the rulings and the reception of this testimony is assigned as error in the petition. There was no sufficient allegations of usury in the answer, and clearly none under which the evidence, to the introduction of which the plaintiff interposed an objection, was

competent, relevant, or material, or could be received, and the court erred in overruling the objections. (*New England Mortgage & Security Co. v. Sandford*, 16 Neb., 689; *Rose v. Munford*, 36 Neb., 148; *Rainbolt v. Strang*, 39 Neb., 339.) Moreover, the evidence of the defendants disclosed that some of the transactions with the bank never were or could have been in any manner connected with or included in the note in suit, and the findings which the jurors made as to the amount which should be deducted from the face of the note, based as it was, upon this and other incompetent evidence, was manifestly erroneous and was not supported by the testimony, there being an entire lack of evidence as to some portions of it. It follows that the judgment of the district court must be reversed and the case remanded.

REVERSED AND REMANDED.

MARY MEEHAN V. FIRST NATIONAL BANK OF FAIRFIELD.

FILED MARCH 5, 1895. No. 5954.

- Mortgages: FORECLOSURE: ACTION TO RECOVER DEBT: ELECTION.** Under the provisions of sections 847, 848, 849, 850, and 851 of the Code of Civil Procedure, which should be construed together, and when so construed show that it was the intention of the law-maker not to allow two actions for the one debt to be pending or prosecuted concurrently in point of time, a creditor whose debt is secured by mortgage may either commence and prosecute to judgment an action at law for the recovery of the amount of the debt, or enforce its payment by means of foreclosure; but, having elected which means he will first adopt, and commenced proceedings accordingly, he must exhaust the remedy so chosen before resorting to the other.
- : ———: AUTHORITY TO BRING ACTION FOR DEBT.** Where a mortgage debt is secured by the obligation or other evidence of debt of any other person besides the mortgagor, the mortgagee

44	213
46	864
44	213
51	845
54	569
44	213
56	644
57	210
57	211
57	213
57	296
57	605
44	213
61	694
44	213
62	439
62	440
62	441

Meehan v. First Nat. Bank of Fairfield.

cannot, during the pendency or after decree rendered in the action to foreclose the mortgage, enforce such obligation or evidence of debt in an action at law, unless authorized to commence such action by the court having jurisdiction of the suit of foreclosure.

3. ———: ———: ———: PLEADING. The lack of authorization to bring such an action is not a defense necessary to be pleaded, but the contrary should be alleged, or at least proved by the plaintiff, as, without such authorization, the action cannot be maintained.
4. ———: ———: ———: PARTIES. A mortgagee, who by indorsing the notes evidencing the debt which a mortgage is given to secure becomes liable for their payment or for the payment of any sum or balance remaining after foreclosure of the mortgage and application of the proceeds of a sale made under the decree upon the indebtedness, is a proper party to an action to foreclose the mortgage, and as such cannot be sued at law for the recovery of the amount of the debt during pendency or after judgment in such foreclosure proceedings without leave obtained of the court having jurisdiction of the action of foreclosure to commence such suit at law.
5. Pleading and Proof. The pleadings and evidence in this case *held* insufficient to sustain the verdict.

ERROR from the district court of Clay county. Tried below before HASTINGS, J.

J. L. Epperson & Sons, for plaintiff in error.

• *S. W. Christy and E. E. Hairgrove*, contra.

HARRISON, J.

• The bank, defendant in error, commenced an action against plaintiff in error in the district court of Clay county to recover the sum of \$614.47, alleged in the petition to be due it from her as indorser of two promissory notes executed and delivered to her by one Ralph J. Little and indorsed by her and transferred to Fowler and Cowles or order and by them regularly transferred to the bank. In her answer defendant in error admitted the execution and delivery of the notes by Ralph J. Little to her and that she

indorsed and transferred them to the parties alleged in the petition, and denied all other allegations of the petition, and further alleged that Ralph J. Little, at the time of making the notes in suit, also gave her a mortgage upon the west half of the northwest quarter and the north half of the southwest quarter of section 10, town 5 north, range 8 west, in Clay county, Nebraska, to secure the payment of them; that the land was ample security for their payment, being worth the sum of \$4,000; that the bank had foreclosed the mortgage on the land, and under and by virtue of an order of the district court of Clay county sold the land September 24, 1888, and at the foreclosure sale purchased the land, but failed and neglected to credit the amount for which the land sold, or any part of it, on the notes secured by the mortgage sued upon in this action, and that the bank received in the land more than the amount of the debt evidenced by the notes; that the bank has not further proceeded against Ralph J. Little, either to avail itself of a deficiency judgment against him in the foreclosure suit or in any other manner, although he is fully able to pay the amount due upon the notes. There is the further allegation in the answer that these were the notes secured by the mortgage which had been foreclosed and no authority had been granted by the court to the bank to institute this action. The reply of the bank admitted that the notes had been secured by the mortgage on the land, that it had been foreclosed and the land appraised, advertised, and sold according to law under order of sale issued in the foreclosure suit, and stated that there was a prior mortgage on the land, in payment of which the proceeds were applied, there not being sufficient realized to pay the amount of the debt secured by the prior mortgage; that the land was worth not to exceed \$1,200, and brought at foreclosure sale \$800, being sold subject to taxes amounting to \$72.40; that the amount of the debt secured by prior mortgage at the time of the sale was more than \$1,300. It was admitted that the

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bank had instituted no further proceedings than the foreclosure against Ralph J. Little to collect the amount due on the notes, and further stated that Little was a non-resident of the state of Nebraska, and his residence unknown to the bank; that the only service had upon him in the foreclosure proceedings was constructive or service by publication, and that he had not made a personal appearance therein. There was also a general denial of all statements of the answer not admitted in the reply. To try the issues presented a jury was impaneled, and the bank introduced evidence to prove its ownership of the notes in suit by indorsement and transfer to it, confining its evidence solely to this purpose and rested. The record then states:

“The defendants now offer to prove that the mortgaged premises mortgaged to secure these notes were worth the sum of \$3,000 and were at the time of the sale of the premises worth \$3,000, and also offer to prove that the notes and mortgage which secured the payment thereof were put in the foreclosure suit of the first mortgage and that the total amount of the notes there foreclosed was less than the value of the land.

“Objected to, as incompetent, immaterial, and irrelevant. Sustained. Defendant excepts.

“Defendants further offer to prove that foreclosure proceedings were instituted as set forth in the defendants’ answer by the plaintiff, and decree entered and the property sold and no credits placed upon these notes.

“Objected to, as incompetent, immaterial, and irrelevant. Sustained. Exception.

“Defendant further offers to prove that no especial authorization appears of record for the institution of this action and subsequent to the decree of foreclosure mentioned in defendants’ answer.

“Objected to, as incompetent, immaterial, and irrelevant. Sustained. Exception taken.

“Defendant rests.”

We presume from the record that the jury received no instructions. None appear therein, and there is a statement that "after hearing the evidence adduced" and arguments of counsel, they returned a verdict in favor of the bank in the sum of \$704.25. Motion for new trial was filed for plaintiff in error, which was overruled and judgment rendered on the verdict.

One of the contentions made in behalf of plaintiff in error is that the court erred in excluding the evidence offered to prove that no authorization appears of record for the institution of this action, obtained from the court, in which the decree foreclosing the mortgage was entered. This was alleged in the answer as a defense and the offer to prove as herein quoted was made, and, upon objection, refused. The question raised by this assignment of error may be stated as follows: Was it necessary for the defendant in error to obtain leave of the court in which the foreclosure proceedings were prosecuted, before commencing this suit for any amount remaining due on the notes or the whole sum, if nothing was derived from the foreclosure decree to apply in their payment, it being a court of this state and in this particular instance the same court? The answer to this depends upon the meaning, scope, and effect to be given to the provisions of certain sections of our Code of Civil Procedure under the title "Foreclosure of Mortgages by Action." In sections 850 and 851 it is provided that in every petition filed to foreclose a mortgage it must be stated whether any proceedings at law have been had for the recovery of the debt secured by the mortgage or any part of it, and if it appear that a judgment at law has been obtained for such debt or any part of it, no proceedings shall be had in the foreclosure case unless it further appear that an execution has been issued and returned by the proper officer that the execution is unsatisfied in whole or in part, and that the defendant has no property whereof to satisfy such execution, except the

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mortgaged premises. From this it is clear that if the creditor first proceeds at law for the collection of a debt which is secured by mortgage, he must exhaust the remedy at law before he will be allowed to prosecute foreclosure proceedings. Sections 847 and 849 are as follows:

“Sec. 847. When a petition shall be filed for the satisfaction of a mortgage, the court shall not only have the power to decree and compel the delivery of the possession of the premises to the purchaser thereof, but on the coming in of the report of sale, the court shall have power to decree and direct the payment by the mortgagor of any balance of the mortgage debt that may remain unsatisfied after a sale of the mortgaged premises, in the cases in which such balance is recoverable at law; and for that purpose may issue the necessary execution as in other cases, against other property of the mortgagor.”

“Sec. 849. If the mortgage debt be secured by the obligation or other evidence of debt of any other person besides the mortgagor, the complainant may make such person a party to the petition, and the court may decree payment of the balance of such debt remaining unsatisfied after a sale of the mortgaged premises, as well against such other person as the mortgagor, and may enforce such decree as in other cases.”

By these two sections it is made possible for the creditor foreclosing a mortgage to combine with the remedy by foreclosure the remedy at law, by what is termed “a deficiency judgment” for the amount of the debt which remains after sale of the mortgaged premises and the application of the proceeds to the extinguishment of the debt secured by the mortgage. Section 848 is as follows:

“After such petition shall be filed, while the same is pending, and after a decree rendered thereon, no proceedings whatever shall be had at law for the recovery of the debt secured by the mortgage, or any part thereof, unless authorized by the court.”

By reading and construing these sections together, as they should be, we reach the following conclusions: That if a creditor whose debt is secured by mortgage commences an action at law for the recovery of the debt and obtains judgment, before he can afterwards foreclose his mortgage by suit, he must show that he has exhausted the remedy at law; and if he first begins an action of foreclosure to enforce payment of the debt, inasmuch as he may, in the suit by foreclosure, recover a deficiency judgment against all proper parties who are liable for the payment of the indebtedness for any amount of the debt which the proceeds of the sale of the mortgaged property under the decree are insufficient to meet, then he must, if for any reason they have not been made parties to the foreclosure suit, or for any valid reason he desires to commence an action at law against any one of them, obtain permission so to do of the court before which foreclosure proceedings are pending or were instituted. It seems to have been contemplated by the law-maker in the enactment of these provisions embodied in the sections alluded to that whichever course of procedure the creditor might elect to pursue for the recovery of his debt he should pursue it to the end, and that while either a suit at law or action of foreclosure was in progress, the other should not and could not be, and whichever was first commenced, full relief should be afforded and obtained by it if possible before resorting to the other. The purpose of these provisions is evidently to avoid the two actions being in progress at the same time, and also the double costs and expenses, and to confine the creditor as closely as may be consistent with justice to him and his demands to the one action, and more especially does this seem true of the foreclosure action in which he is allowed to first subject the mortgaged property to the payment of the debt and the further remedy of a deficiency judgment for any balance of the debt remaining unextinguished. The courts of New York have so construed and applied similar sections

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or statutory provisions in that state, and have held, in regard to the necessity of being authorized to sue at law after decree in suit by foreclosure,—the section of the statute under consideration being as follows: “After such bill shall be filed, while the same is pending, and after a decree rendered thereon, no proceedings whatever shall be had at law for the recovery of the debt secured by the mortgage, or any part thereof, unless authorized by the court of chancery,”—that “The owner of a debt secured by mortgage who holds an obligation or covenant for its payment or collection, given by a person other than the mortgagor, cannot enforce the obligation by action during the pendency of, or after judgment in, an action to foreclose the mortgage, unless authorized by the court. Also held that the lack of authority to sue was not a defense necessary to be pleaded and proved affirmatively by defendants, but as there was no right of action without the authority, it was for the plaintiff to allege, or at least to prove it, in order to maintain his action.” (See *Soofield v. Doscher*, 72 N. Y., 491; *Equitable Life Ins. Society v. Stevens*, 63 N. Y., 341.)

One of the sections of the Code under consideration provides specifically for a deficiency judgment against a mortgagor in an action of foreclosure, but in this case we must determine who are within the authorization contained in section 849, where it states that if the mortgage debt be secured by the obligation or other evidence of debt of any other person besides the mortgagor, such person may be made a party to the petition and a deficiency judgment obtained against such person as well as the mortgagor. Does it include a person who, as in this case, indorses and transfers the note secured by the mortgage, and by the indorsement becomes liable to the holder for its payment? A grantee of the mortgaged premises who assumed or agreed to pay the debt secured by the mortgage, as the whole or part of the consideration for such purchase, may be made a party to an action to foreclose the mortgage, and judgment

for any deficiency may be rendered against him in the action. (*Cooper v. Foss*, 15 Neb., 515; *Rockwell v. Blair Savings Bank*, 31 Neb., 128; *Reynolds v. Dietz*, 39 Neb., 186.)

In New Jersey the statute provides as follows: "It shall be lawful for the chancellor, in any suit for the foreclosure or sale of mortgaged premises, to decree the payment of any excess of the mortgage debt above the net proceeds of the sale, by any of the parties to such suit who may be liable, either at law or in equity, for the payment of the same;" and, in construing the provision in so far as it relates to parties, in the case of *Jarman v. Wiswall*, 24 N. J. Eq., 267, it was held: "A mortgagee who assigns the mortgage and guaranties the debt is a proper party in a suit to foreclose the mortgage and a personal decree may be made against him for any deficiency;" and it was said by the court in the opinion: "The defendant insists that the word 'parties' in that act must be construed to mean necessary parties, and he further insists that a mere guarantor is not a necessary, nor even a proper, party to a suit for foreclosure. I do not think so. A guarantor in such a case is not a necessary party, but he is a proper party. He is interested in the account to be taken in the suit of the amount due on the security, the payment of which he has guarantied. He is interested in the judicial sale in which the proceedings may result; that it shall be lawfully conducted, and that the property shall not be unnecessarily sacrificed." (See *Curtis v. Tyler*, 9 Paige Ch. [N. Y.], 432; *Jones v. Stienbergh*, 1 Barb. Ch. [N. Y.], 250; *Luce v. Hinds*, Clarke, Ch. [N. Y.], 317; *Sauer v. Steinbauer*, 14 Wis., 76; *Equitable Life Ins. Society v. Stevens*, *supra*; *Scofield v. Doscher*, *supra*; *Burdick v. Burdick*, 20 Wis., 367.) See, also, *Bristol v. Morgan*, 3 Edw. Ch. [N. Y.], 142, where it was stated that, regardless of statutory provisions, a mortgagee who assigns the mortgage and guaranties its payment is a proper party to an action to foreclose it. With reference to an indorser of a note secured by mortgage being made a

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party to the foreclosure suit see *Eastman v. Turman*, 24 Cal., 380. We conclude that, under the provisions of our Code with reference to foreclosure actions, the indorser of a note or notes secured by mortgage, having become liable, by the indorsement and transfer, for the payment to the holder of the whole amount of the debt evidenced by the note, or any sum remaining due thereon after the sale of the mortgaged premises and application of the proceeds to its payment, if not a necessary party to an action to foreclose the mortgage, is a proper party and may be made a party, and judgment rendered against such indorser therein for any such deficiency; and this being true, it follows that in order to bring suit at law against the indorser of a note secured by mortgage during pendency of a suit to foreclose, or after decree therein, the creditor must comply with the requirements of section 848 and obtain leave of the court having jurisdiction of the foreclosure suit to commence the action at law. This was not done, so far as the record discloses, in the case at bar, and as the issues were joined the plaintiff in error had assumed the burden of proving that it had not been done and should have been allowed to do so. But aside from this the defendant in error, in the reply, admitted the beginning of the foreclosure proceedings and decree obtained therein; and no authorization, by the court, of the institution of the suit of law is either pleaded or appears from the testimony, and hence the pleadings and proof are insufficient to sustain the verdict rendered and the judgment must be reversed and the cause remanded.

REVERSED AND REMANDED.

GEORGE BURKE ET AL. V. CHARLES H. FRYE ET AL.

FILED MARCH 5, 1895. No. 6027.

1. **Agency: PROOF.** The fact of his agency cannot be established by the mere declarations of one assuming to act in that capacity. Without other proofs of authority, compliance with directions given by such assumed agent will not bind the party for whom he claims to act.

2. **Factors and Brokers: IMPLIED DUTY TO SELL AT DESTINATION.** Where a consignment was made to a commission merchant for sale without instruction, in the absence of an established usage to the contrary, of which the consignor has or must be presumed to have knowledge, the consignee's authority to sell cannot be delegated, and its exercise is limited to the place to which the consignment was originally made.

ERROR from the district court of Douglas county. Tried below before KEYSOR, J.

Hall & McCulloch, for plaintiffs in error.

Charles Offutt and *Charles S. Lobingier*, *contra*, cited, contending that agency could not be proved merely by declarations of the alleged agent: 1 Greenleaf, Evidence [14th ed.], sec. 114, and cases there cited; *Cleveland Stove Co. v. Hovey*, 26 Neb., 624; contending that plaintiffs in error owed the implied duty to sell at South Omaha: The authorities cited in the opinion, and *Phy v. Clark*, 35 Ill., 377-382.

RYAN, C.

In September, 1888, the firm of Frye & Bruhn shipped from Idaho to the firm of George Burke & Frazier, a live stock commission firm in South Omaha, sixty-two head of cattle. The firm first named had, previous to said shipment, written to that last named that the number of cattle proposed to be shipped was seventy-three. After shipment, however, there was written the following letter:

44	223
44	088
44	223
45	780
44	223
47	629
48	481
44	223
52	275
44	223
58	413

Burke v. Frye.

"POCATELLO, September 9, 1888.

"*Messrs. Burke & Frazier, South Omaha*—DEAR SIR: Instead of shipping four car loads of cattle which we started with from Shoshone, we culled them some and sent three car loads, or sixty-three head, all pretty good cattle, which we hope you will sell to the best of your ability. We met Mr. Gallup here, and he wrote to you also. You can deposit the proceeds to our credit at First National Bank, Butte City, Montana. We sent a young man, and paid him, with the cattle, and hope he will come through all right. The cattle ought to be at North Platte Wednesday evening. If you have some man there we wish you would instruct him to look out for the cattle and see they leave North Platte all right. Wire us weight and price for cattle here at Pocatello.

"Yours respectfully,

FRYE & BRUHN,

"Butte City, Mon.

"P. S.—The contract calls for four cars cattle. The agent here says we will have to straighten the matter in Omaha, as we only sent three from Pocatello. Perhaps you can fix it all right with the freight agent for us.

"FRYE & BRUHN."

Upon receipt of the cattle the firm of George Burke & Frazier offered them for sale, one day receiving an offer of \$3.65 per hundredweight, the next an offer of \$3.85 per hundred. Neither of these offers were accepted, but instead the cattle were forwarded to Chicago and there sold by a commission firm at such figures as, compared with the highest offer made in South Omaha, netted a loss of at least the amount of the judgment rendered upon a suit therefor brought in the district court of Douglas county by Frye & Bruhn against George Burke & Frazier. During the trial there was an attempt to prove that the failure to sell in the South Omaha market was attributable to directions given by the "young man sent with the cattle," as he was described in the above letter. This question was presented

Burke v. Frye.

by asking J. A. Frazier, a member of the firm of George Burke & Frazier, what conversation was had between witness and the aforesaid young man at the time the cattle came in, supplemented by the following offer of proof to be elicited by it if there should be permitted an answer, to-wit: "We offer to prove by this witness that the three car loads of cattle in controversy were in charge of a man by the name of Frye, with whom the witness Frazier had a conversation with regard to the advisability of selling the cattle in South Omaha, or sending them on to Chicago; that in this conversation said Frye told the witness that the cattle should not be sold in South Omaha unless he could receive \$4.10 per hundred and that they should hold them one day after the offer of \$3.85 which has been testified to, and unless \$4.10 could be obtained they should be shipped on to Chicago; that not being able to obtain the amount specified the cattle were shipped to Chicago and sold there." In *Dunphy v. Bartenbach*, 40 Neb., 143, it was said: "While an offer to prove is necessary to illustrate the purpose for which the question has been asked, we do not understand that by a mere offer to prove certain facts the materiality, relevancy, or competency of testimony which by no possible means could be responsive to the question propounded is presented for determination." The question propounded to Mr. Frazier required that he should state what conversation took place between himself and Mr. Frye. The offer of proof was, first, to establish the fact that Mr. Frye was the agent of Frye & Bruhn, and, second, to show what instructions as such agent he gave to Mr. Frazier. In *Stoll v. Sheldon*, 13 Neb., 207, this court made use of the following language: "In the case of *Graul v. Strutzel*, 53 Ia., 712; it was held by the supreme court of Iowa that an agent's authority cannot be shown by his own testimony. That is, where an agent is acting under a special authority, the principal will only be bound to the extent of the authority. An attorney in releasing a surety

is acting under a special power which must be proved. As there is an entire failure of proof upon that point, the court did not err in directing a verdict for the defendant in error." As was pointed out in *Nostrum v. Halliday*, 39 Neb., on page 831, the denial of the right to prove an agent's authority by his own testimony attributed to the supreme court of Iowa, was but a *lapsus linguæ*, and that the intention was evidently to state the familiar proposition that an agent's authority cannot be proved by his own mere declaration. This proposition without question embodies sound law.

The first matter to be established by the testimony of Mr. Frazier was that in a conversation had with Mr. Frye the witness was told by Mr. Frye that he was in charge of the cattle; in other words, as related to the subject-matter of this action, that he was the agent of Messrs. Frye & Bruhn with respect to said cattle. This, under the rule above recognized, was clearly incompetent. From this it inevitably resulted that the second matter proposed to be proved—that is, that this Mr. Frye gave certain directions, as agent, regarding the disposition to be made of this stock under certain contingencies—was not competent unless founded upon authority independent of that above contemplated. No such showing was attempted. So far as the proofs go there was nothing to indicate to what extent, if at all, this Mr. Frye represented, or was authorized to act for Messrs. Frye & Bruhn with respect to the cattle with which he had been sent from Pocatello except as this may be assumed from the letter to George Burke & Frazier. A careful consideration of the language employed and of the circumstances under which this letter was written satisfies us that the district court was correct in its assumption that the firm of George Burke & Frazier had no right to act upon or be governed by any directions given by the young man who had simply been sent with the stock which said firm was expected to sell. In various ways implied au-

thority of George Burke & Frazier as commission merchants to forward the cattle received by them at South Omaha to another market was presented. The letter of the consignor in no way indicates that the consignee in turn might consign to Chicago. While the commission merchants named sometimes sent stock to Chicago to be sold the evidence discloses the fact that in such cases the sales were conducted by commission brokers in Chicago, and that George Burke & Frazier had no office in Chicago for that purpose. There is no proof whatever that the original consignors knew that under any circumstances George Burke & Frazier forwarded consignments from South Omaha to Chicago. There could therefore be entertained no presumption that such procedure would be approved. The right of commission merchants to take this course, if it at all exists, must be implied from the mere fact of being employed in that capacity. In *Phillips v. Scott*, 43 Mo., 86, there was used the following apposite language: "It would seem to be altogether reasonable, as well as consistent with the general principles of law regulating agency, to presume that, where a consignment is made to a factor for sale unaccompanied with instructions from the principal and in the absence of an established usage of trade to the contrary, it is intended to be sold at the place of residence of the factor. The intent of the principal, which in such a case is to be gathered from the circumstances alone, fixes the character of the contract between the parties as to the place of sale, and the factor is not at liberty to disregard it." The same doctrine prevailed in *Catlin v. Bell*, 4 Camp. [Eng.], 183; *Kauffman v. Beasley*, 54 Tex., 563; *Grieff v. Cowguill*, 2 Dis. [O.], 58; Smith, *Mercantile Law*, 148; Dunlap's *Paley, Agency*, 177, and Story, *Agency*, secs. 33 and 34. In this case there was an offer to prove that among South Omaha live stock commission merchants it was customary, when prices offered were unsatisfactory at that place, to send cattle for-

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ward to Chicago for sale in that market. There was no claim that the firm of Frye & Bruhn had knowledge of this usage, neither was there a pretense that this custom was anything but local and confined to South Omaha. It would be very unfair by mere implication to bind shippers from distant points like Pocatello by a local usage peculiar to South Omaha, solely because of an election to consign to commission merchants at that market. These general observations cover all the questions presented in this court for consideration. The judgment of the district court is

AFFIRMED.

HENRY J. WINDSOR V. JAMES THOMPSON.

FILED MARCH 5, 1895. No. 6119.

Review. Where the right of plaintiff to recover was not affirmatively established by the proofs in the district court, its judgment in favor of the defendant will not be disturbed in this court.

ERROR from the district court of Douglas county. Tried below before KEYSOR, J.

Switzler & McIntosh, for plaintiff in error.

Tiffany & Vinsonhaler and *J. W. Houder*, contra.

RYAN, C.

This action was brought by the plaintiff in error for the recovery of damages caused by the failure of the firm of Miles & Thompson to return, upon his demand, certain abstracts of title furnished to and used by said firm in ascertaining the nature of plaintiff's title to certain real property, upon the faith of which afterwards a desired loan secured by mortgage on said real property had been con-

summated. After there had been an appeal to the district court of Douglas county John L. Miles, one of the defendants, died, and thenceforward the suit was prosecuted against James Thompson as a surviving partner. There was a trial to the court, without the intervention of a jury, resulting in a judgment in favor of Mr. Thompson.

It was not alleged in the petition that any obligation of returning the abstracts of title after consummation of the loan devolved upon the defendants, either by express contract or otherwise. It was averred in the answer that the abstracts in question had been furnished for the purpose above indicated, and that, in consideration of the furnishing of said abstracts and the giving of a mortgage on the property in reference to which the abstracts had been made, the defendants Miles & Thompson had loaned to plaintiff the sum of \$5,000, which loan by its terms did not become payable until June 12, 1891; that on March 2, 1891, the said defendants sold to the German Savings Bank of Davenport, Iowa, the note evidencing the obligation to pay said sum, and that the mortgage and abstracts aforesaid were as part of the security for said loan transferred, with said note, and at the time of filing the answer were held by said bank. The demand for the abstracts was alleged in the petition to have been made of the same date as was that of the above averred transfer to the German Savings Bank. The evidence showed that Mr. Thompson took no part in making the loan to plaintiff, the entire business in that respect having been conducted by Mr. Miles, since deceased. In respect to plaintiff's part in this transaction, his testimony was that he did not remember whether he made a written application for a loan or not; that he did not know whether or not it was part of the agreement that he was to furnish an abstract, for witness at that time was in Cheyenne and Mr. Lander, as his agent, was attending to his business; that Mr. Lander sent for the abstracts and plaintiff sent them to him, and that Lander delivered these ab-

Corbett v. Nat. Bank of Commerce.

stracts to Miles & Thompson. Owing to the death of Mr. Miles we have not the advantage of his testimony on the one hand, and, on the other hand, Mr. Lander was not sworn, so that there is no evidence whatever as to the agreement under which the abstracts were intrusted to the firm of Miles & Thompson. If the proof of general custom in Omaha as to the retention of abstracts by the party making the loan is taken into consideration, there was a decided preponderance in favor of the defendant. This testimony, however, might properly be rejected, since the trial was to the court, and in that event the sole question would be whether or not its finding was contrary to the weight of the remaining evidence. We cannot say that it was, and as plaintiff's right of recovery depends upon an affirmative showing of his right to a return of the abstracts on demand, the judgment of the district court is

AFFIRMED.

44	230
43	32

CHARLES CORBETT V. NATIONAL BANK OF COMMERCE.

FILED MARCH 5, 1895. No. 6163.

1. **Continuance: GROUNDS: TRIAL.** Where a cause was regularly reached for trial on a call of the trial docket and one of the attorneys for the defendant orally announced that the attorney for the defendant was unavoidably absent from the state, but would soon return and attend to the trial of the case called, if it should be postponed for a short time, *held*, no abuse of discretion for the presiding judge to insist that the case must be dismissed, tried, or continued generally.
2. ———: ———: ———. An attorney whose case is called for trial, if unprepared, should at once make such showing to entitle him to a postponement as lies within his power, and if he fails so to do, he will not be permitted in support of a motion for a new trial to urge such matters within his knowledge as, properly presented, should have operated to excuse his entering upon a trial in the first instance.

ERROR from the district court of Douglas county. Tried below before DOANE, J.

B. G. Burbank, for plaintiff in error, cited, contending that the judgment should have been set aside: Sec. 602 of the Code; *McCann v. McLennan*, 3 Neb., 25; *Town of Storm Lake v. Iowa Falls & S. C. R. Co.*, 62 Ia., 218; *Callanan v. Aetna Nat. Bank*, 50 N. W. Rep. [Ia.], 69; *Ellis v. Butler*, 78 Ia., 632, and citations; *Frazier v. Williams*, 18 Ind., 417; *Elston v. Schilling*, 7 Rob. [N. Y.], 74; *Buell v. Emerich*, 85 Cal., 116; Code, sec. 99.

E. J. Cornish, contra.

RYAN, C.

The defendant in error sued the plaintiff in error on two promissory notes made by the latter to the former for the aggregate sum of over twenty thousand dollars. The defense was that these notes had been given to close up a series of loans in which the usurious interest exacted and paid more than equaled the amount of the aforesaid notes. On the 15th day of March, 1892, in the absence of the plaintiff in error, a judgment was rendered against him for the full amount claimed in the petition. This proceeding in error presents for review the refusal of the district court to set aside the above judgment and grant a new trial on a motion for such relief filed April 8, 1892. On the trial bulletin board in February, 1892, of the district court of Douglas county the entries as to this case show: "21-26, Nat. Bk. Commerce v. Chas. Corbett, P. for Cornish; Feby. 19, case marked P.; 23, foot of call; 24, foot of call; 29, P. for Cornish; Mar. 1, P. for Cornish; Mar. 7, foot of call; Mar. 14, foot of call; Mar. 15, the case was tried and marked from call." It is not clear what is meant by the expression, "21-26, Nat. Bk. of Commerce v. Chas. Corbett, P. for Cornish." It was shown by the proofs that

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the letter "P." was used to indicate that the case was passed on a call of the case for trial. If the expression above specially referred to indicated that on the 21st and 26th of February this case was passed at request of Mr. Cornish, there would be five entries of that kind; at any rate the case was in February passed three times at his instance.

There was filed in support of the above described motion an affidavit of Mr. Breen, an attorney for the defendant, by which it was made to appear that the several postponements at the instance of Mr. Cornish were, by affiant, consented to as courtesies extended Mr. Cornish on his request, and, inferentially at least, it was intimated that the defendant should not therefore by Mr. Cornish have been compelled to go to trial when the affiant was necessarily absent from this state. In justification of Mr. Cornish it is but fair to state that the uncontradicted evidence disclosed that when this case was called for trial on February 15, Mr. Cornish stated that he was willing that a trial should be postponed, and a temporary adjournment had to enable Mr. Breen to be present. The district judge refused to permit this course to be taken and informed counsel that the case must be disposed of, either by a trial, dismissal, or continuance, whereupon Mr. Cornish elected to have a trial, which thereupon took place with the result above described. Mr. Cornish made affidavit, without contradiction, that on the day following the trial, as he remembered it, he saw Mr. Breen and stated to him that he would make no objection to the granting of a new trial in said case provided it could be set down for immediate hearing; that Mr. Breen did not until April 8, being twenty-four days after the rendition of judgment, make said motion, and that this was too late to admit of another trial of said cause at the said term of court. The answer was signed "Chas. Corbett, by John P. Breen, Byron G. Burbank, his att'ys." Mr. Burbank above named was present at the final call of this case for trial on February 15. There was attempted no

explanation of the fact that his name was affixed to the answer as counsel for the defendant. In his own affidavit is found the nearest approach to a denial of his being one of the defendant's attorneys which anywhere appears in the record or bill of exceptions. His language was that upon Judge Doane inquiring whether or not this cause was ready for trial affiant "informed his honor, Judge Doane, that affiant was not the attorney in the case and that the case was not ready for trial at that time, for the reason that John P. Breen, attorney of record for defendant, was then absent at Little Rock or Hot Springs, Arkansas." This affiant further stated that he said to Judge Doane that immediately upon the hearing in which Mr. Breen was engaged being closed, Mr. Breen would stand ready for the trial of this action. It is noticeable that by this affidavit it was not attempted to be asserted that the affiant was not an attorney in the case. Very guardedly, possibly from innate modesty, the affiant only disclaimed being the attorney for defendant. He did not show that the defendant was unrepresented, indeed quite of a contrary tendency was this affiant's failure to account for the appearance of his name upon the answer. Under these circumstances it was no abuse of discretion for the district court to insist that upon the case being reached on the regular call of the trial docket it must be disposed of for the current term. If there existed any sufficient reason why the course indicated should not have been pursued it should have been made to appear by the affidavit of Mr. Burbank, or of defendant, or it might have been shown by any other proper method, if such reason existed. After a trial had, it was too late to urge these matters as grounds for granting a new trial. (*City of Lincoln v. Staley*, 32 Neb., 63.) Aside from these circumstances it is worthy of remark that the district court had opportunities of determining whether due diligence had been employed, which are, of necessity, denied this court. The proper dispatch of business requires, too, that the pre-

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siding judge should exercise a certain discretion in the disposition to be made of cases when regularly reached for trial. It does not appear from the proofs submitted that the district court improperly exercised this discretion, its judgment is therefore

AFFIRMED.

**NEBRASKA NATIONAL BANK ET AL. V. GEORGE BURKE
& FRAZIER.**

FILED MARCH 5, 1895. No. 6445.

1. **Evidence: CONVERSATIONS BY TELEPHONE.** The admission of a party sought to be charged, that, at a certain time, he had had a conversation in given terms by telephone, renders immaterial the objection that independently of such admission there was no direct evidence of the scope of such conversation.
2. **Instructions.** It is not required that each instruction shall state the different theories upon which the liability of the defendant may depend. If by one instruction is described one ground of liability, and by another instruction there is set forth another reason for defendant's liability, there exists no good reason why these distinct predicates should of necessity be mentioned in the same instruction.

ERROR from the district court of Douglas county. Tried below before FERGUSON, J.

Chas. Offutt, for plaintiffs in error.

Hall & McCulloch, contra.

RYAN, C.

This action was instituted in the district court of Douglas county by George Burke & Frazier, a copartnership, against the Nebraska National Bank of Beatrice and Lillie May Sigman, to recover the sum of \$1,000, with interest

Nebraska Nat. Bank v. Burke.

thereon from June 5, 1890. It is not disputed that in June, 1890, Mr. Sigman, the husband of Lillie, deposited to his credit and had cashed by the Nebraska National Bank of Beatrice two drafts which he drew on George Burke & Frazier through said bank, one for \$1,000 the other for \$600. These drafts were forwarded by the Nebraska National Bank of Beatrice through the regular commercial channels for presentation to George Burke & Frazier and collection from them. These drafts were accepted when presented, and at the expiration of three days' grace they were paid.

George Burke & Frazier, in this action, sought to recover the amount of the money thus paid to the bank, on the allegations that when the drafts were presented to them they telephoned to Beatrice to the said Nebraska National Bank to inquire whether the cattle would be shipped to meet the drafts, and being informed by the said bank that the cattle would be shipped to meet the drafts, the said George Burke & Frazier accepted the same; that Lillie May Sigman had entrusted to the Nebraska National Bank certain blank drafts to which her signature had been attached, to be filled out and used whenever shipments would be made by her, and that said bank drew upon plaintiffs by using two of the above described blank drafts. Plaintiffs alleged further that afterwards said cattle were diverted to Chicago and marketed there, and were not shipped to plaintiffs as the said bank agreed. They further charged that when the drafts became due, at the end of the days of grace, the cattle not having been received, they again telephoned to said bank at Beatrice, and were informed by it that they might draw for the money and that the bank would pay the same; and that thereupon they did draw upon Sigman for the amount of the money so fraudulently held back by said bank, and payment of said draft was refused. The Nebraska National Bank of Beatrice denied that any such agreements were made between and it

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George Burke & Frazier. The case was tried to a jury and a verdict rendered in behalf of George Burke & Frazier for the amount of the two drafts with interest. A motion for a new trial was overruled and a judgment entered upon the verdict. The case is now here on error to reverse this judgment upon two grounds, to-wit:

"1. Incompetent evidence was admitted in behalf of George Burke & Frazier, and against the objection of the bank.

"2. The instructions of the trial court were erroneous and contradictory."

1. The incompetent evidence complained of was given by George Burke, a member of the firm of George Burke & Frazier. His testimony was descriptive of a conversation which he said his firm, on June 5, 1890, had with the cashier of the bank at Beatrice by telephone between the place of business of the bank and South Omaha, the place of business of plaintiffs. The material part of this conversation was as follows:

Q. What communication did you have with them?

A. We asked them what the drafts were drawn for, and they answered that they were drawn on some stock that would be shipped in a day or so.

Q. What, if anything, further was said?

A. We asked them if they would guaranty the shipment of stock, and they said they would.

Q. After this communication, then, what, if anything, was done by you?

A. We paid the drafts, or accepted them, as they show.

Q. After those drafts were accepted on that date, when, if at all, were they presented for payment?

A. They were presented on the 7th.

Q. At that time had the stock arrived?

A. It had not.

Q. Did you then have any further communication with the Nebraska National Bank of Beatrice?

A. We did. We called them up.

Q. In what way?

A. By telephone.

Q. You may state what that communication was.

A. We called them up by telephone, and told them that the stock had not arrived to meet that draft. They informed us that the stock had been shipped to Chicago, and that we should draw through their bank on Sigman for the amount of these drafts, and that it would be paid.

Q. Did you draw a draft pursuant to the instructions that you received from this bank?

A. We did.

Q. You may tell the jury whether or not that draft was paid.

A. It was not.

There was afterward developed by cross-examination of Mr. Burke the fact that he, in person, did not carry on the above conversation on behalf of the firm of which he was a member, but that this was done by Mr. Harris, who, at the telephone as the conversation progressed, reported the same to Mr. Burke. On the ground that the testimony of Mr. Burke was but hearsay there was a motion to exclude it. This was not passed upon until after there had been evidence given by Mr. Burke that at a time subsequent to June 5, aforesaid, he had had a conversation with the cashier of the bank at Beatrice, by whom it was admitted that with some one representing George Burke & Frazier he, the said cashier, at the time above indicated, had had a conversation, the language of which was substantially the same as that above detailed. Mr. Burke's testimony was to some extent confirmed by that of R. S. Hall, Esq., who was present at the time the last mentioned conversation took place. This being the condition of the proofs at the time the motion to exclude was overruled, it is manifest that it would have been error to have excluded Mr. Burke's version of the conversation which had been had over the telephone,

for his knowledge thereof acquired by admission of the cashier was not based upon mere hearsay.

2. It is insisted that between instruction No. 4 given by the court on its own motion and instruction No. 4 given at the request of the bank there was an irreconcilable inconsistency. These, given in the order in which they have just been referred to, were as follows:

"4. I instruct you that if you find from the evidence that the plaintiffs did, on June 5, 1890, accept the two drafts sued on without being at the time informed by the defendant bank that cattle would be shipped to meet said drafts to plaintiffs, and relying thereon, that if you so find from the evidence, the plaintiffs cannot recover in this action against the bank. If, on the other hand, you find from the evidence that on June 5, 1890, at the time plaintiffs accepted the two drafts in question, the defendant bank had informed said plaintiffs by telephone that cattle would be shipped to meet said drafts, and that plaintiffs relied on said information, and by reason thereof accepted said drafts, and you further find that said cattle were not shipped and that plaintiffs paid said drafts upon said acceptance, then, if you so find from the evidence, the plaintiffs would be entitled to recover in this case from said bank."

The instruction asked on behalf of George Burke & Frazier was as follows:

"4. The jury are instructed that if they believe from the evidence that the money represented in the two drafts paid by Burke & Frazier was first furnished by the defendant bank to Sigman to buy cattle and then drawn for by said bank on Burke & Frazier and paid by them to said bank, and you further believe from the evidence that it was the intention of Sigman that the cattle so purchased should be shipped to the said Burke & Frazier to meet said drafts, and that said bank so understood at the time it drew said drafts, and you further find that said cattle were afterward diverted to Chicago with the knowledge of said bank, and

said bank again received the money so advanced by it out of the proceeds of the sale in Chicago, said bank would be liable for the money so obtained from Burke & Frazier, and your verdict, if you find as above stated, should be for the plaintiffs for the amount of said drafts, with interest at seven per cent per annum from June 7, 1890."

In the first of these instructions the ground of liability of the bank was predicated upon its false representation acted upon, that Mr. Sigman would ship certain cattle to Burke & Frazier as an inducement to said firm to accept the drafts which form the subject-matter of this action. In the second instruction the ground of liability was the receipt and retention of funds furnished by Burke & Frazier to pay for the stock expected to be shipped to that firm in South Omaha as the bank knew, and the acquiescence of the bank in such shipment being afterwards made to Chicago and its receipt and retention of the proceeds of the sale there made. These grounds upon which the defendant bank might be held liable were distinct it is true, but each was consistent with the other and either presented a sufficient reason for holding the bank liable. There existed no reason for mingling these independent grounds of liability in the same instruction. The judgment of the district court is

AFFIRMED.

EDWARD BROWN ET AL. V. ROYAL C. CLEVELAND.

FILED MARCH 5, 1895. No. 6050.

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47	689

44	239
58	814

44	239
60	15

- 1. Review: CONFLICTING EVIDENCE.** Where the evidence was conflicting the verdict reached will not be disturbed unless clearly unsustained by the proofs.
- 2. Trial: FAILURE TO EXCEPT TO TESTIMONY: WAIVER.** When testimony has been received without objection, the question of

Brown v. Cleveland.

its competency is waived, and such testimony will not afterwards be eliminated from the records merely because upon proper timely objection it would have been excluded. Following *Oberfelder v. Karanaugh*, 29 Neb., 427.

ERROR from the district court of Douglas county. Tried below before FERGUSON, J.

Herdman & Herdman, for plaintiffs in error.

John P. Breen, contra.

RYAN, C.

The defendant in error recovered judgment against Edward Brown, who did not answer, as well as against John J. Gibson, whose answer was a general denial. Error proceedings by both defendants present for review the questions which we shall now consider.

The action was for the value of certain hay and grain averred to have been sold by the defendant in error to the plaintiffs in error, constituting the alleged firm of Brown & Co. The sole question of fact, as to which there was a controversy on the trial, was whether or not Mr. Gibson was associated as a partner with Mr. Brown in the livery business when the latter purchased for use in the stable the various articles of feed for the payment of which Mr. Gibson, as a partner, was by the jury found liable. As there was sufficient proof to justify this verdict it will not be disturbed as being without support of evidence. During the trial a Mr. Mace testified that at various times, and while the several items were being sold by the defendant in error, he, the said witness, likewise sold hay and grain for use in the same stable as was that as to which a recovery was prayed in this case; that these sales were negotiated with Mr. Brown, by whom, as well as by other parties, the witness had been told that Mr. Gibson was associated as a partner with Mr. Brown and that witness had sued both alleged partners for the amount of his bill, whereupon Mr.

Gibson settled. On cross-examination Mr. Mace said that the settlement with Mr. Gibson was at a discount—Mr. Gibson all the time disclaiming the alleged partnership relation—and that both witness and Mr. Gibson agreed to settle solely to avoid the trouble and expense of litigation. It is very clear that this testimony on proper objections should have been excluded. Without conceding to any extent the competency of the residue, that which disclosed the fact of settlement most certainly was not admissible, for the law favors the amicable adjustment of differences. All this testimony was, however, introduced without an objection being interposed by the plaintiffs in error. After it had been fully detailed, and this witness dismissed, plaintiffs in error asked that all his testimony might be stricken out. This was not proper, for having permitted this evidence to go in without objection the plaintiffs in error were not entitled to have it stricken out, and the district court properly so ruled. (*Oberfelder v. Kavanaugh*, 29 Neb., 427; *Palmer v. Witcherly*, 15 Neb., 98.) No other question is presented by the petition in error and the judgment of the district court is

AFFIRMED.

OMAHA FIRE INSURANCE COMPANY V. JOSEPH DUFEK.

FILED MARCH 5, 1895. No. 5913.

INSURANCE: MISDESCRIPTION OF PROPERTY: REFORMATION OF POLICY. In a policy of insurance, a misdescription of the land whereon was situate certain personal property insured did not release the insurer from liability from loss; and, as a condition precedent to an action on the policy, no reformation thereof was necessary. Following *Phenix Ins. Co. v. Gebhart*, 32 Neb., 144.

ERROR from the district court of Saunders county. Tried below before BATES, J.

Omaha Fire Ins. Co. v. Dufek.

Hewitt & Olmstead, for plaintiff in error.

Frick & Dolezal, contra.

RYAN, C.

This action was brought in the district court of Saunders county to recover the value of twenty-two tons of broom corn destroyed by fire. There was a verdict and judgment against the defendant in said district court for the sum of \$900.

The petition in error in effect presents but two questions: one is the sufficiency of the evidence to support the verdict; the other the admission of evidence to show that when the broom corn was insured and destroyed it was in a building situate on section 30, township 17 north, range 5 east, 6th P. M., instead of section 30, township 14, range aforesaid. There was no such an absence of evidence as would justify interference with the verdict, and no useful purpose could be subserved by reviewing it at length merely to demonstrate the correctness of this conclusion reached upon full consideration of the evidence. In relation to the mistaken description of the township above indicated, the testimony of Mr. Folda, the insurance company's agent who wrote the policy sued on, was as follows: "Some few days previous to the issuing of the insurance policy Mr. Dufek came in and made an application for insurance on his buildings, the house and other buildings situated on the premises. He gave me the application, the description being, I think, section 30, township 17, range 5, in Saunders county. He also stated to me that he was wishing to place some insurance on broom corn. I stated to him that I could not insure his broom corn that same day as it was a prohibited risk by the company, but I would write to the company and find out if they wished to place the risk. They did, and I placed the insurance on it. I wrote to the company stating the facts,

and when it came back I went ahead and issued the policy, and that error being as township 14 is an error on my part for the reason I issued this policy without the presence of Mr. Dufek himself." There was proof unquestioned that Mr. Dufek had no other broom corn than that which was destroyed by fire.

The contentions of plaintiff in error with reference to the necessity of a reformation of the policy precedent to bringing suit and the alleged fatal effect of the misdescription noted are fully met by the following language quoted from *Phenix Ins. Co. v. Gebhart*, 32 Neb., 144: "The precise question here involved was before this court in *State Ins. Co. v. Schreck*, 27 Neb., 527, and it was held that the variance [misdescription as to the *locus* of the insured property] was not material. The agreement in a policy is to insure certain property of a party—such as the house in which he and his family reside, a barn on his farm, or a warehouse for the storage of produce, or, as in this case, certain personal property. A misdescription of the land on which any of these are situated will not defeat a recovery in case of loss by fire, because the court looks at the real contract of the parties, which was to insure certain property of the policy holder. The fact that such property was on a particular section, as section 16 instead of 17, cannot of itself affect the risk and would not render the policy void." The judgment of the district court is

AFFIRMED.

44 244
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BADGER LUMBER COMPANY ET AL., APPELLEES, V.
EMMA H. HOLMES ET AL., APPELLANTS.

FILED MARCH 5, 1895. No. 6266.

1. **Mechanics' Liens: PROPERTY COVERED.** A material-man contracted with the owner of six city lots to furnish him material for the erection of six buildings, one on each of said lots. The material was furnished and so used. In a suit by the material-man to have established and foreclosed a lien against said lots for the balance due for material furnished under said contract, the district court, by its decree, gave the material-man a lien on a portion of said lots for the entire amount remaining due for the material furnished under the contract. The evidence did not show what proportion of the material furnished was used in the construction of the buildings on the lots made liable by the decree for the balance due. *Held*, (1) That the whole debt might be charged to all the real estate; (2) but all the debt could not be charged to a part of the lots; (3) that the decree should be reversed.
2. ———: ———: **APPORTIONMENT.** Where it is sought to charge a part only of certain real estate for the value of material furnished for the erection of improvements upon all said real estate, then the value of the material furnished must be apportioned so that the parts of the real estate charged shall bear no greater amount of the expense than the value of the material actually used in constructing the improvement made on such part. *Byrd v. Cochran*, 39 Neb., 109, followed and reaffirmed.

APPEAL from the district court of Lancaster county.
Heard below before TIBBETS, J.

Harwood, Ames & Pettis, for appellants, cited: *Doolittle v. Plenz*, 16 Neb., 153; 2 *Jones*, Liens, secs. 1313-1315; *Holmes v. Richet*, 56 Cal., 307; *McCarty v. Van Etten*, 4 Minn., 358; *Knox v. Starks*, 4 Minn., 7; *Roose v. Billingsly*, 74 Ia., 51.

Albert Watkins and *Dawes, Coffroth & Cunningham*, contra, cited, contending that the material-man was entitled

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to a joint lien: *Wakefield v. Latey*, 39 Neb., 285; Phillips, Mechanics' Liens, secs. 374, 376; *Mandeville v. Reed*, 13 Abb. Pr. [N. Y.], 173; *Bowman Lumber Co. v. Newton*, 72 Ia., 90; *Lewis v. Saylor*, 73 Ia., 504; *Stockwell v. Carpenter*, 27 Ia., 119; *Millsap v. Ball*, 30 Neb., 728; *Bohn Mfg. Co. v. Kountze*, 30 Neb., 719; *Wilcox v. Woodruff*, 61 Conn., 578; *White Lake Lumber Co. v. Russell*, 22 Neb., 126; *Oster v. Rabeneau*, 46 Mo., 595; *Rose v. Perse*, 29 Conn., 256; Phillips, Mechanics' Liens, sec. 387.

RAGAN, C.

On the 25th day of August, 1890, the Badger Lumber Company, a corporation dealing in lumber in the city of Lincoln, filed in the office of the register of deeds, in Lancaster county, a "verified account of items" of certain material which it alleged it had, previous to that time, furnished for the erection of a "dwelling house" upon certain real estate. This "verified account of items" recited that in the month of August, 1889, one Cadwalader entered into a verbal contract with the Badger Lumber Company for lumber and other material for the erection of a dwelling house on lots 1, 2, 3, 10, 11, 12, in block 3, in Avondale Addition to the city of Lincoln; that in pursuance of said verbal contract the Badger Lumber Company, between the 14th day of August, 1889, and the 2d day of May, 1890, furnished the material mentioned in said account on said premises, and that such material was used on said premises in the construction of said "dwelling house," and claimed a lien against said premises for such material for a balance of \$492.18 remaining unpaid. The Badger Lumber Company brought this action in the district court of Lancaster county, making the "verified account of items" filed in the office of the register of deeds of said county the basis of its suit, and in its petition set out the making of the verbal contract with Cadwalader to furnish material for the erection of a "dwelling house" on said real estate; that it had

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furnished such material; the making, verification, and filing of the "account of items" of material furnished under the contract, and the balance remaining due thereon, and prayed that it might be decreed a lien upon said real estate for the balance due it for the material furnished under the contract with Cadwalader. Numerous parties were made defendants to the action, among them Cadwalader and wife and W. W. Holmes and wife, the latter of whom had become the owners of those portions of said premises mentioned in the court's decree. The district court found and decreed that there was a balance of \$580 due from Cadwalader and wife to the Badger Lumber Company for material which it had furnished Cadwalader under his verbal contract with the lumber company, and to secure its payment decreed the lumber company a lien on the south fifty feet of lots 1 and 2, the north fifty feet of lots 11 and 12, the south fifty feet of lots 11 and 12, and the west forty-five feet of lot 10, in block 3, in Avondale Addition to the city of Lincoln; and from this decree the representatives of W. W. Holmes have appealed.

The undisputed evidence is that the verbal contract between the Badger Lumber Company and Cadwalader was that the former would furnish material to the latter for erecting a building on each of the six lots mentioned in the "verified account of items" filed in the office of the register of deeds by the Badger Lumber Company; that the material, in pursuance of said contract, was used indiscriminately by Cadwalader in erecting these buildings, one on each of said six lots. But the evidence does not show, nor was there any attempt to show, what proportion of the material mentioned was used in constructing the buildings on the lots and parts of lots which, by the decree of the district court, was made liable for the balance due the Badger Lumber Company from Cadwalader. In *Byrd v. Cochran*, 39 Neb., 109, HARRISON, J., speaking for this court, said: "When a subcontractor paints two separate

houses and furnishes the paint and other materials necessary for use in the painting, * * * in order to recover upon a mechanic's lien filed against one of the houses and the lot upon which it stands it must be shown that the amount charged against the one house and lot is the value of the labor performed upon, and materials furnished for, such house, or an estimate made by some method or plan which will produce a certain definite result, and mere approximation or guess-work will not suffice to establish the lien." (*Doolittle v. Plenz*, 16 Neb., 153.) This case is decisive of this appeal. Here the contract was to furnish material to erect six buildings upon six lots, the material was so furnished, and it was used indiscriminately in building each of the six buildings. The whole debt then might be charged to all six of the lots. (*Wakefield v. Latey*, 39 Neb., 285.) But all the debt for all the material cannot be charged to a part of the lots. If it is sought to charge a part only of the lots for material furnished under the contract, then the amount of the material furnished must be apportioned so that the parts charged shall bear no greater amount of the expense than the value of the material actually used on said parts in the construction of the improvements made thereon.

The finding and decree of the district court in favor of the Badger Lumber Company only is reversed and the cause remanded to the district court for further proceedings in accordance with this opinion. All the costs of this appeal are to be taxed to the Badger Lumber Company.

JUDGMENT ACCORDINGLY.

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MORRIS MORRISON ET AL. V. GEORGE H. BOGGS ET AL.

FILED MARCH 5, 1895. No. 6117.

1. **Bonds: PENALTIES.** The object of a penalty in a bond is to fix the limit of the liability of the signers thereof.
2. ———: **FORCIBLE ENTRY AND DETAINER.** Section 1030 of the Code of Civil Procedure makes the signers of the bond of a defendant, in a forcible detainer suit against whom a judgment of restitution has been rendered, and who appeals, liable, if such judgment shall be affirmed, for the costs of the suit and for the reasonable rent of the premises during the time the defendant wrongfully withholds possession of the premises.
3. ———: ———: **MEASURE OF DAMAGES.** Said section fixes the measure of damages of the signers of a bond executed in pursuance of its provisions.
4. ———: ———: **PENAL SUM NEED NOT BE SPECIFIED.** A writing obligatory, whether it be called a bond or undertaking, executed in accordance with the provisions of said section and for the purposes mentioned therein, is not void because no specific sum of money is specified therein as a penalty.
5. ———: ———: **SIGNATURE.** Whether it is necessary to the validity of the bond mentioned in said section that it be signed as principal by the defendant in the judgment appealed from not decided.
6. **Evidence: PROCEEDINGS IN COLLATERAL ACTIONS.** Where a case is appealed to the district court and the issue in another action is whether the case appealed was tried in the appellate court, a finding made or verdict returned, and a judgment pronounced thereon, such issue can be proved by a certified copy of the record of proceedings had in the case in the appellate court.
7. **Cases Distinguished.** *Gregory v. Cameron*, 7 Neb., 414, and *State v. Cochran*, 28 Neb., 798, distinguished.

ERROR from the district court of Douglas county. Tried below before KEYSOR, J.

Morris & Beekman, for plaintiffs in error, cited in addition to cases discussed in the opinion: *Turner v. Lord*, 4

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S. W. Rep. [Mo.], 420; *Austin v. Richardson*, 1 Gratt. [Va.], 310; *Farni v. Tesson*, 1 Black [U. S.], 309; *Bragg v. Murray*, 6 Munf. [Va.], 32; *Garrett v. Shove*, 9 Atl. Rep. [R. I.], 901; *Irwin v. State*, 10 Neb., 325.

J. W. West, contra.

RAGAN, C.

George H. Boggs and Lew W. Hill, copartners under the name of Boggs & Hill, brought this suit in the district court of Douglas county against Henry P. Horen, Morris Morrison, and John O'Keefe. The suit was based on a bond, undertaking, or writing obligatory executed in pursuance of the provisions of section 1030 of the Code of Civil Procedure and which was in words and figures as follows:

"Know all men by these presents, that Henry P. Horen, as principal, and Morris Morrison and John O'Keefe, as sureties, are held and firmly bound unto the firm of Boggs & Hill in the penal sum of —, for the payment of which, well and truly to be made, we jointly and severally bind ourselves. Dated this 19th day of October, A. D. 1888. Whereas in an action of forcible entry and detainer tried before R. D. A. Wade, a justice of the peace of Douglas county, Nebraska, wherein Boggs and Hill *was* [were] plaintiffs and Henry P. Horen was defendant, judgment was rendered by said justice in favor of said plaintiffs, from which judgment the defendant now appeals to the district court: Now, therefore, the condition of this obligation is such that if judgment is rendered against said defendant on said appeal, that he will satisfy said final judgment and costs; and we will satisfy and pay a reasonable rent for the premises during the time he wrongfully withholds the same, then this obligation to be null and void, otherwise remain in full force and effect.

HENRY P. HOREN.

"MORRIS MORRISON.

"JOHN O'KEEFE."

The petition then alleged that the judgment of the justice of the peace was affirmed by the district court on the 9th of August, 1890; that Horen wrongfully withheld the possession of the premises sued for for a period of two years, and that the reasonable rent of said premises for that time was \$600, for which sum judgment was prayed. Boggs & Hill had a verdict and judgment, and Morrison and O'Keefe prosecute to this court proceedings in error. Two arguments are relied on here for a reversal of this judgment.

1. The first assignment of error is that the district court erred in admitting in evidence the written obligation made the basis of this suit. The argument is that the obligation sued upon is not a bond within the meaning of section 1030 of the Code of Civil Procedure, the contention being that it is not such bond because no certain sum of money is mentioned in said obligation as a penalty. Section 1030 of the Code provides: "Either party may appeal from the judgment rendered by such justice by giving bond with two responsible sureties to be approved by the justice, conditioned: If the plaintiff appeals to satisfy the final judgment and costs; if the defendant appeals to satisfy the final judgment and costs, and pay a reasonable rent for the premises during the time he wrongfully withholds the same." It will be observed that the obligation sued upon is in exact conformity with this section of the Code. This statute does not require that a bond executed in pursuance of its provisions should have therein any specific sum of money fixed as a penalty for such bond. The object of a penalty in a bond is to fix the limit of the liability of the signers thereof; and the statute, by its provisions, makes the signers of a bond of a defendant in a forcible detainer suit against whom a judgment of restitution has been rendered, and who appeals, liable, if such judgment shall be affirmed, for the costs of the suit and for a reasonable rent of the premises during the time the defendant shall wrong-

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fully withhold possession of the premises from the plaintiff. This statute fixes the measure of damages of the signers of a bond executed in pursuance of its provisions. It was never the intention of the legislature to invest a justice of the peace with discretion to make the liability of the signers of such a bond more or less than that provided for by the statute. What guide would a justice of the peace have for fixing the penalty in a bond of this character? How could he determine what length of time the appeal might be pending? How could he determine the reasonable rental value of the premises for an indefinite time?

Counsel for the plaintiffs in error in support of their contention cite us to *Gregory v. Cameron*, 7 Neb., 414. Section 481 of the Code of Civil Procedure, in force when that case was decided, but since repealed, provided that judgments "shall be stayed * * * whenever the defendant * * * shall enter into a bond to the plaintiff with one or more sufficient sureties," etc. A judgment was obtained against Cameron, and McMurtry and Gregory signed a writing obligatory and had it approved by the probate court before whom the judgment against Cameron was rendered in words and figures as follows: "In pursuance of the statute in such case made and provided, J. H. McMurtry and J. S. Gregory, for the purpose of staying the above judgment, do hereby promise and undertake to pay the above judgment, interest, and costs, and the costs that may accrue." Suit having been brought on this written agreement signed by McMurtry and Gregory, the court held that the writing obligatory signed by them did not satisfy said section 481 of the Code; that the issuing of an execution on said judgment against Cameron was not stayed by the execution of said instrument and its approval, and that, therefore, the signers were not liable. The court said: "It was not a bond executed by the defendants to the plaintiff in the judgment, but it was merely an undertaking to pay the

judgment, interest, and costs, executed by sureties alone." In other words, the court held that said section 481 required the writing obligatory to be executed by the judgment debtor as principal and by sureties in order to prevent the issuing of an execution for the satisfaction of a judgment. But in the case at bar the writing obligatory, called a bond, was signed by the defendant, against whom the judgment was rendered, as principal, and by the plaintiffs in error as sureties. *Gregory v. Cameron, supra*, then is not an authority in this case.

Another case relied on by the plaintiffs in error is *State v. Cochran*, 28 Neb., 798. That case involved a construction of section 1049 of the Code, which provides that a defendant against whom a judgment had been rendered may stay an execution "by entering into an undertaking with [to] the adverse party * * * with good and sufficient surety, * * * conditioned for the payment of the amount of said judgment, * * * which undertaking shall be entered on the docket of the justice and be signed by the surety." One Strange recovered a judgment against Bowlby and Knox, and for the purpose of staying an execution to satisfy such judgment they procured one Stevens and one Love to execute an undertaking conditioned as required by said section 1049, that at the expiration of the stay they would satisfy the judgment. The writing obligatory signed by Stevens and Love, however, was not signed by the judgment debtors Bowlby and Knox. It would seem from reading the opinion, although it is not so stated therein, that the justice of the peace refused to issue an execution on this judgment after the execution of the writing obligatory by Stevens and Love, and that Strange applied to this court for a writ of *mandamus* to compel him to do so, claiming that the bond, undertaking, or writing obligatory, executed by Stevens and Love for the purpose of staying the issuing of an execution on the judgment, was void because not signed by the defend-

ants to the judgment; and the court held that a bond or undertaking executed in pursuance of said section 1049 of the Code need not be signed by the judgment debtor. This conclusion of the court was based on the language of the section that such "undertaking shall be entered on the docket of the justice and be signed by the surety." It will thus be seen that *State v. Cochran, supra*, is not an authority in point in the case at bar.

In other words, the two cases cited by counsel simply decide this: The case in 7 Neb., that an instrument in writing executed in pursuance of section 481 of the Code, as it once existed, for the purpose of staying the issuing of an execution on a judgment, to have that effect and be valid and bind the signers thereof, must be signed by the judgment debtor. The case in 28 Neb., that an instrument executed in pursuance of section 1049 of the Code of Civil Procedure, for the purpose of staying the issuing of an execution on a judgment, to have that effect and to be valid, need not be signed by the judgment debtor. But neither of these cases go to the length of holding that where the word "bond" is used in our statutes or Code, the term is to be necessarily given the full meaning it had at common law. A bond at common law to be valid had to be in writing and to be under seal, and the legislature, by using the word "bond," in section 1030 of the Code of Civil Procedure, did not mean a writing obligatory such as would come within the meaning of a bond at common law.

The writing obligatory made the basis of this suit, whether it be called a bond or an undertaking, conforms to the statute in every essential particular. The statute does not prescribe any form of such bond, but it does prescribe the conditions of such bond, and fixes the measure of damages of the signers thereof. We do not decide that a bond executed in pursuance of said section 1030, to be valid, must be signed by the defendant against whom the judgment of restitution is rendered, but if such is the correct construc-

tion of the section the instrument in suit complies therewith. But we do decide that a writing obligatory, whether it be called a bond or an undertaking, executed in accordance with the provisions of said section 1030, and for the purposes mentioned in said section, is not void because no specific sum of money is specified in such writing obligatory as a penalty. The assignment of error must be overruled.

2. As already stated, Boggs & Hill alleged in their petition in the district court that the judgment they had obtained against Horen before the justice of the peace had been affirmed on appeal by the district court. The defendants Horen, Morrison, and O'Keefe, in their answer, admitted that Horen had perfected in the district court his appeal from the justice of the peace, but denied that such judgment had ever been affirmed by the district court. Boggs & Hill, to prove their allegation that the district court had by its judgment affirmed the judgment of the justice of the peace, put in evidence a duly certified copy of an order made by the district court in a case entitled "George H. Boggs et al. v. Henry P. Horen et al." The material parts of this order were and are in words and figures as follows:

"This cause coming on to be heard upon the application of Mary Horen, praying that the judgment heretofore rendered herein in favor of plaintiffs and against defendants be set aside and claiming in a petition of intervention filed by the said Mary Horen that she was the owner of a certain building situated upon the real estate described in the complaint herein, and the court being fully advised in the premises, after hearing the testimony of the said Mary Horen and other witnesses on her behalf, and witnesses on behalf of the said plaintiffs, finds for the said plaintiffs.

"The court further finds that the said Mary Horen has wholly failed to prove her case, and that said building situated upon said premises was not and is not owned by her, and that the said plaintiffs have lawful right to remove said

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house from said premises under a judgment for restitution obtained by said plaintiffs against said defendants at a former term of said court.

“Wherefore it is adjudged and considered that the said plaintiffs have restitution of the premises described in the judgment of this court, and that said writ of restitution be issued and served on the 20th day of September, 1890, and that plaintiffs have and recover their costs in this proceeding, taxed at \$——.”

This was the only evidence offered or given to prove the issue made by the pleadings as to the affirmance by the district court of the judgment of the justice of the peace rendered against Horen and from which he appealed. We do not think this evidence sufficient to establish such issue. It does not purport to be a judgment in favor of Boggs & Hill against Henry P. Horen rendered in the forcible detainer suit. It seems to be an order or a judgment rendered by the district court on a petition of intervention filed in the action of Boggs v. Horen by one Mary Horen. The evidence shows that the case appealed from the justice of the peace was docketed in the district court. Was the action tried in the district court? If so, on what pleadings? Was a finding or verdict returned? If so, what were they? Was a judgment rendered on the finding or verdict made? If so, what was that judgment? Was the appeal for any reason dismissed and the judgment thereby affirmed? If so, where is the judgment of dismissal? Where an appeal is taken to the district court and it is claimed that the action was there tried, a finding made or verdict returned, and a judgment pronounced thereon, such facts can be proved by a certified copy of the record of the proceedings in such case. For the reason that the judgment of the district court is not sustained by sufficient competent evidence it is reversed and the cause remanded.

REVERSED AND REMANDED.

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NATIONAL MASONIC ACCIDENT ASSOCIATION V. GEORGE F. BURR.

FILED MARCH 5, 1895. No. 6039.

1. **Mutual Benefit Societies: ACCIDENT INSURANCE.** The charter and by-laws of the National Masonic Accident Association of Des Moines, Iowa, examined, and *held*: (1) That the object of the association is to furnish its members the advantages of accident insurance; (2) that the association has no capital and no capital stock; that the only moneys it ever has are derived from the membership fees and dues and assessments paid by its members; (3) that these moneys are used for the purpose of paying the operating expenses of the association and paying the weekly or other benefits due to its members; (4) that the association is purely a mutual institution, only members of the Masonic fraternity being eligible to membership; (5) that the association does not issue policies, as that term is generally understood, but issues to each of its members a certificate of membership; (6) that its members are divided into classes according to the hazard of the occupation they pursue; (7) that the scheme contemplated by the association is the payment of a certain sum per week for a specified time to such of its members as may be temporarily injured; and if such injury proves to be permanent or results in death, then the payment to such member or his beneficiary of a gross sum of money.
2. ———: **DEFAULT IN PAYING ASSESSMENTS: SUSPENSION: WAIVER.** The certificate of membership provides: "This association does not agree to pay any certificate holder or beneficiary * * * a greater sum than is realized by said association from one assessment of two dollars made and collected upon all members assessable at the date of the accident." "To keep this certificate in force all assessments and dues must be paid within thirty days of the date of the notice from the secretary calling therefor." The by-laws of the association provide: "Information of the amount of each required payment and of the time when the same is to be paid shall be given by the secretary to each member by mailing a written or printed notice to him, postage prepaid, at his last given post-office address at least thirty days prior to the maturity of such payment. * * * And it shall thereupon be the duty of each member to promptly pay the same to the secretary at his office in Des Moines, Iowa, on or

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before such time of maturity. If any member shall fail to pay any required payment on or before the day so fixed, his certificate and membership shall cease to be of any force and validity and can only be revived by payment thereof. No indemnity or benefits of any kind shall be paid for or on account of any injury received between the time when the delinquent payment became due and the time when the same is received by the secretary at his office. No suit shall be brought upon any disputed claim before the same shall have been arbitrated by a committee, and the award of such committee shall be final and conclusive upon the claimant and the association." On the 14th of February, 1891, the board of directors of the association made an assessment of three dollars upon each of its members. This assessment matured on the 1st day of April, and notice thereof was duly given to George F. Burr, who was a member of the association. Burr did not pay his assessment on or prior to April 1st. About noon of April 27th, 1891, Burr was injured and made a claim against the association for the weekly benefits which he alleged he was entitled to be paid as the result of his injury and his membership. The association refused to pay the claim, and Burr brought this suit. The evidence tended to show that on the 25th of April, 1891, Burr mailed a letter at York, Nebraska, directed to the association in Des Moines, Iowa, containing his check for three dollars to pay the assessment due April 1, and that ordinarily such letter would reach the association on the 26th or by the morning of the 27th of April. On the other hand, there was evidence which tended to show that this check was received by the association on the morning of the 29th of April, or not earlier than the afternoon of the 27th of April. On the trial the association requested the district court to instruct the jury that "Plaintiff having not paid such assessment at or before maturity, his certificate ceases to be in force and effect until the payment actually reached the secretary at his office in Des Moines, and plaintiff's certificate of membership only becomes valid from the time said secretary received such payment at his office in Des Moines. If you find from the evidence that the payment was received by the secretary at his office in Des Moines previous to the time that the accident happened to the plaintiff, then the plaintiff is entitled to recover; but if the said payment did not reach the secretary's office in Des Moines until after said accident happened to the plaintiff, then the plaintiff is not entitled to recover in any sum whatever." This instruction the court refused. *Held*, (1) That it was not for the district court to say whether the evidence established the fact that the assessment remitted by Burr to the asso-

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ciation was received by it prior to the time he was injured; that was a question which the jury, and the jury alone, had a right to determine; (2) that Burr's failure to pay the assessment due the 1st day of April on or before that date did not oust him from membership in such association, but suspended his right to claim indemnity from the association for an injury received after the assessment became due and before such payment was made; (3) that the nature and objects of the association considered, the retention by the association of the remittance made by Burr was not evidence that the association waived Burr's default; (4) that the court erred in refusing to give the instruction.

3. ———: **ARBITRATION CLAUSE VOID.** On the trial the association requested the court to instruct the jury that before Burr could maintain an action upon the claim he must have procured it to have been arbitrated by a committee of arbitration as provided by the articles of incorporation of the association; that such arbitration was a condition precedent to the right of Burr to maintain the suit. This instruction the district court refused. *Held*, (1) That the ruling of the district court was correct; (2) that whatever may be the rule elsewhere, it is the firmly established doctrine here that if parties to a contract agree that if a dispute arises between them that such dispute shall be submitted to arbitration, refusal to arbitrate or no arbitration is not a defense to an action brought on such contract by one of the parties thereto, as the effect of such agreement is to oust the courts of their jurisdiction, and is contrary to public policy and therefore void.

4. **Stare Decisis.** *Home Fire Ins. Co. v. Benn*, 42 Neb., 537, and cases there cited, and *Phenix Ins. Co. v. Buchelder*, 32 Neb., 490, 39 Neb., 95, followed and reaffirmed.

ERROR from the district court of York county. Tried below before BATES, J.

Merton Meeker and Clark Varnum, for plaintiff in error:

The National Masonic Accident Association is a mutual concern, a fact which is determined by the statute under which it is organized. (*State v. Critchett*, 37 Minn., 13; *Block v. Valley Mutual Insurance Association*, 52 Ark., 201; *Masonic Aid Association v. Taylor*, 50 N. W. Rep. [S. Dak.], 93; *State v. Whitmore*, 75 Wis., 332; *Common-*

wealth v. Equitable Benevolent Association, 18 Atl. Rep. [Pa.], 1112.)

Members of mutual insurance companies are conclusively presumed to know what the laws of the organization are, and must act accordingly. (*Pfister v. Gerwig*, 122 Ind., 567; *Coleman v. Knights of Honor*, 18 Mo. App., 189; *Coles v. Iowa State Mutual Ins. Co.*, 18 Ia., 425; *Fugure v. Mutual Society of St. Joseph*, 46 Vt., 368; *People v. St. George Society of Detroit*, 28 Mich., 261; *Sperry's Appeal*, 116 Pa. St., 391; *Osceola Tribe No. 11 Independent Order of Red Men v. Schmidt*, 57 Md., 98; *Belleville Ins. Co. v. Van Winkle*, 12 N. J. Eq., 335; *Hanf v. Northwestern Masonic Aid Association*, 45 N. W. Rep. [Wis.], 315; *Hood v. Hartshorn*, 100 Mass., 117; *Rowe v. Williams*, 97 Mass., 163; *Davenport v. Long Island Ins. Co.*, 10 Daly [N. Y.], 535; *Delaware & Hudson Canal Co. v. Pennsylvania Coal Co.*, 50 N. Y., 250; *Lafond v. Deems*, 81 N. Y., 507; *Hudson v. McCartney*, 33 Wis., 331; *Herrick v. Belknap*, 27 Vt., 673; *United States v. Robeson*, 9 Pet. [U. S.], 319; *Trott v. City Ins. Co.*, 1 Cliff. [U. S.], 439; *Viney v. Bignold*, 20 Q. B. Div. [Eng.], 172; *Holland v. Supreme Council Chosen Friends*, 25 Atl. Rep. [N. J.], 367.)

Even an old line insurer is not liable during default in premiums. (*Phenix Ins. Co. v. Bachelder*, 32 Neb., and citations.)

There was and could have been no waiver of the provisions of the by-laws as to time of payment. (*Hale v. Mutual Fire Ins. Co.*, 6 Gray [Mass.], 169; *Brewer v. Mutual Fire Ins. Co.*, 14 Gray [Mass.], 203; *German Ins. Co. v. Heiduk*, 30 Neb., 288; *Dawes v. North River Ins. Co.*, 7 Cow. [N. Y.], 461.) Arbitration was a condition precedent to suit. (*Canfield v. Maccabees*, 87 Mich., 626; *Van Poucke v. St. Vincent De Paul Society*, 63 Mich., 378; *Anacosta Tribe of Red Men v. Murbach*, 13 Md., 91; *Toran v. Howard Association*, 4 Pa. St., 519; *Woolsey v. Independent Order of Odd Fellows*, 61 Ia., 492; *Rood v.*

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Railway Passenger & Freight Conductors Mutual Benefit Association, 31 Fed. Rep., 62; *Bauer v. Samson Lodge, Knights of Pythias*, 102 Ind., 262; *Leech v. Harris*, 2 Brewster [Pa.], 571; *Osceola Tribe No. 11 Independent Order of Red Men v. Schmidt*, 57 Md., 98; *Harrington v. Workingmen's Building Association*, 70 Ga., 340; *Old Saucelito Land & Dry Dock Co. v. Commercial Union Assurance Co.*, 5 Pac. Rep. [Cal.], 232; *Perkins v. United States Electric Light Co.*, 16 Fed. Rep., 513; *Smith v. Boston, C. & M. R. Co.*, 36 N. H., 458; *Holmes v. Richet*, 56 Cal., 307; *Huley v. Bellamy*, 137 Mass., 357; *Palmer v. Clark*, 106 Mass., 373; *Hood v. Hartshorn*, 100 Mass., 117; *Rowe v. Williams*, 97 Mass., 163; *Davenport v. Long Island Ins. Co.*, 10 Daly [N. Y.], 535; *Delaware & Hudson Canal Co. v. Pennsylvania Coal Co.*, 50 N. Y., 250; *Lafond v. Deems*, 81 N. Y., 507; *Hudson v. McCartney*, 33 Wis., 331; *Herrick v. Belknap*, 27 Vt., 673; *United States v. Robeson*, 9 Pet. [U. S.], 319; *Trott v. City Ins. Co.*, 1 Cliff. [U. S.], 439; *Viney v. Bignold*, 20 Q. B. Div. [Eng.], 172.)

Sedgwick & Power, *contra*, cited, contending that the delay in payment had been waived. (*Schoneman v. Western Ins. Co.*, 16 Neb., 406, and authorities cited; *Phoenix Ins. Co. v. Lansing*, 15 Neb., 494; *Nebraska & Iowa Ins. Co. v. Christensen*, 29 Neb., 572; *Phenix Ins. Co. v. Bachelder*, 32 Neb., 490; *Grand Lodge v. Brand*, 29 Neb., 644; *Western Horse & Cattle Ins. Co. v. Scheidle*, 18 Neb., 495.)

The arbitration clause is invalid. (*German-American Ins. Co. v. Etherton*, 25 Neb., 505; *Western Horse & Cattle Ins. Co. v. Putnam*, 20 Neb., 331; *Bacon, Mutual Benevolent Societies*, sec. 450.)

RAGAN, C.

The National Masonic Accident Association (hereinafter called the "association,") is a corporation organized under

the laws of the state of Iowa and domiciled in the city of Des Moines, in said state. The object of the association is to furnish its members the advantages of accident insurance. The association has no capital and no capital stock. It is purely a mutual institution. Only members of the Masonic fraternity can become members of the association. The association does not issue policies, as that term is generally understood, but issues to each of its members a certificate of membership. The members are divided into classes according to the hazard of the occupation pursued by them. The scheme contemplated by the association is the payment of a certain sum per week for a specified time to such of its members as may be temporarily injured; and if such injury proves to be permanent or results in death, then the payment to such member or his designated beneficiary of a gross sum of money. The certificate of membership issued by the association provides: "This association does not agree to pay to any certificate holder or beneficiary * * * a greater sum than is realized by said association from one assessment of two dollars made and collected upon all members assessable at the date of the accident." The only money or capital that the association ever has is derived from membership fees and dues paid by and assessments made on its members, and these moneys are used for the purposes of paying the operating expenses of the association and paying the weekly or other benefits due to its members. The certificate of membership also provides: "To keep this certificate in force all assessments and dues must be paid within thirty days of the date of the notice from the secretary calling therefor." The affairs of the association are conducted by a board of directors chosen annually from among its members, each member of the association being entitled to cast one vote for the election of the directory. This vote may be cast either in person by the member or his proxy. A small membership fee is required to be paid by each person on his becoming

a member of the association, and each member is required to pay to the association the further sum of one dollar on the 1st days of January, April, July, and October of each year. These moneys are used in defraying the operating expenses of the association so far as they may be necessary to that purpose, and the surplus is applied to the payment of benefits and death claims. When proof of the death or injury by accident of any member is received by the association, if there are not sufficient funds in the treasury to pay the benefits or death loss, an assessment is levied upon each member of the association for that purpose.

The by-laws of the association provide: "Information of the amount of each required payment—assessment for the payment of benefits or death losses—and of the time when the same is to be paid shall be given by the secretary to each member by mailing a written or printed notice to him, postage prepaid, at his last given post-office address, at least thirty days prior to the maturity of such payment. Notice so given shall be full legal notification of such payment and it shall thereupon be the duty of each member to promptly pay the same to the secretary at his office in Des Moines, Iowa, on or before such time of maturity. If any member shall fail to pay any required payment on or before the day so fixed his certificate and membership shall cease to be of any force or validity, and can only be revived by payment thereof. No indemnity or benefits of any kind shall be paid for or on account of any injury received between the time when the delinquent payment became due and the time when the same is received by the secretary at his office." The articles of incorporation of the association also provide: "Disputed claims shall be adjusted as follows: Should such a claim arise it shall be referred to a committee of three, all of whom shall be master Masons, one to be chosen by the assured or his representative, one by the association, and the two so chosen shall select the third; none of whom shall be relatives of

the assured or have any pecuniary interest in the claim. No suit shall be brought upon any disputed claim before the same shall have been arbitrated by such committee; and the award of such committee shall be final and conclusive upon the claimant and the association."

On the 17th day of April, 1890, George F. Burr was accepted as a member of the association and a certificate of membership of that date duly issued to him. On the 14th of February, 1891, the board of directors of the association made an assessment of three dollars upon each member of the association for the purpose of raising money to pay the expenses of the association and benefits to members who were justly entitled thereto. On or before the 1st of March, 1891, the secretary of the association mailed in the city of Des Moines, postage prepaid, a notice of this assessment addressed to Burr at his post-office in York, Nebraska. The notice stated the amount of such assessment, and that it would be due and payable at the office of the secretary on the 1st day of April, 1891. Burr did not pay this assessment on or prior to April 1st, 1891. About noon of the 27th day of April, 1891, Burr was injured and made claim to the association for the weekly benefit which it pays to its injured members. The association refused to pay the benefits, and Burr brought this action against it in the district court of York county to recover the benefits which he alleged he was entitled to be paid by the association as the result of his injury and his membership in such association. He had a verdict and judgment and the association has prosecuted to this court a petition in error.

1. The evidence is undisputed that Burr was injured about noon on the 27th day of April, 1891; that an assessment of \$3 was levied against him and all other members of the association by its board of directors on or about the 14th of February, 1891, for the purpose of raising money to pay the operating expenses of the association and benefits to certain of its members who were entitled thereto; that

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the secretary of the association mailed a notice of this assessment to Burr, with the postage prepaid, at Des Moines, Iowa, and addressed to Burr, at York, Nebraska, on or before the 1st day of March, 1891; that this assessment was due and payable at the office of the secretary of the association in Des Moines, Iowa, on the 1st day of April, 1891; that Burr did not pay this assessment on or before that date. There is some evidence in the record, on behalf of Burr, which tends to show that on the 25th of April, 1891, he mailed a letter at York, Nebraska, directed to the association, or its secretary, in Des Moines, Iowa, containing an ordinary check drawn by him on a bank for \$3 to pay the assessment which had matured the 1st of April, and that ordinarily such letter and check would reach Des Moines on the evening of the 26th or on the morning of the 27th of April. On the other hand, the evidence tends very strongly to show that the check which Burr sent to the association to pay the assessment due April 1, was received by the association on the morning of the 29th of April, 1891, or at least after noon of the 27th of April, 1891. With this evidence before it the association requested the district court to instruct the jury: "Plaintiff having not paid such assessment at or before maturity his certificate ceases to be in force and effect until the payment actually reached the secretary at his office in Des Moines, and plaintiff's certificate of membership only becomes valid from the time said secretary received such payment at his office in Des Moines. If you find from the evidence that the payment was received by the secretary at his office in Des Moines previous to the time that the accident happened to the plaintiff, then the plaintiff is entitled to recover; but if the said payment did not reach the secretary's office in Des Moines until after said accident happened to the plaintiff, then the plaintiff is not entitled to recover in any sum whatever." The district court refused to give this instruction, but peremptorily instructed the jury to return a ver-

dict for Burr for the amount claimed in his petition. The learned district court was wrong in refusing to give the instruction asked and erred in instructing the jury to return a verdict for Burr. The relations existing between the association and Burr and all its other members is a contractual one, and the contract of the association with Burr and its other members is made up of the articles of incorporation, the by-laws thereof, and the certificate of membership of the members. (*Holland v. Supreme Council of the Order of Chosen Friends*, 25 Atl. Rep. [N. J.], 367.) By the articles and by-laws of the association and the terms of the certificate of Burr's membership therein, Burr contracted and promised to pay the assessment levied against him and which matured on April 1st on or before that date, and if he made that payment the association promised him, in case he should be temporarily injured prior to that time, to pay him an indemnity of \$25 per week for a certain length of time for time lost as the result of such injury. The contract between the association and Burr further provided that if Burr should fail to pay this assessment on the day it matured that from that day until he did make such payment his certificate of membership or the force and effect of it should be suspended; and that he should not be entitled to any indemnity or benefits on account of any injury received by him between the time when the assessments became due, April 1, and the date when the assessment levied against him should be received by the association at its office in Des Moines, Iowa. It was not for the district court to say whether the evidence established the fact that the assessment remitted by Burr to the association was received by it prior to the time he was injured. That was a question which the jury, and the jury alone, had the right to determine. Burr's failure to pay the assessment due the 1st day of April on or before that date did not oust him from membership in such association, but suspended his

right to claim indemnity from the association for an injury he received after the assessment became due and before its payment; but Burr's rights as a member of the association and his claims for an injury received were reinstated at the very moment of time that the association received at its office in Des Moines the assessment paid by Burr. The argument of counsel for Burr here is, and this is perhaps the argument which influenced the court below, that as the association received the assessment remitted by Burr and retained it the association thereby waived Burr's default in not paying it on the day it matured, and though Burr's claim to indemnity had been suspended since the 1st of April, the receipt and retention of the assessment by the association annulled the suspension and restored Burr to the same rights he would have occupied had he paid his assessment the day it matured. The answer to this argument is that there is no evidence in the record that would sustain a finding either by a court or a jury that the association waived Burr's default in making the payment of this assessment due April 1. It must be borne in mind that this is not an ordinary insurance company which sells insurance to whoever will buy, but it is a mutual concern, and it is only by the assessments levied upon all its members that the benefits to which a member is entitled if he be injured, or the death benefits to which his beneficiary is entitled if he shall die from an injury, can be paid. Every member of the association knows and must know this, and if all members of the association refuse to pay assessments levied against them when due the association will have no funds with which to make good its promise to its members and its business would be at an end. A member who fails to pay his assessment when due, though he may afterwards pay it and his rights as a member be reinstated from the time of making such payment, has no cause to complain because his rights as a member and his claims against the association are not made to date back so

as to cover any injury he may have received during the time of his default, for this is his express contract, and it is a reasonable and valid one. If a member refuses to pay his assessment when due, then the injured member for whose benefit the assessment was levied receives that much less indemnity than he would have received if the defaulting member had paid his assessment, and if the defaulting member, while in default, shall become injured, to require the other members to indemnify him would be to permit the party to a contract who had violated it to enforce it as against a party thereto who had kept all his promises. Here the contract is that all the members must pay their assessments in order that if one be injured he may be indemnified for loss of time. One member is injured and one or some members refuse to pay their assessments and the injured party's indemnity is diminished by so much. On what principle of law or equity then can the defaulting members who are injured during their default claim that the other members should indemnify them for the injury received while in default? *Phenix Ins. Co. v. Bachelder*, 32 Neb., 490, was a suit on a fire insurance policy issued by an ordinary capitalized corporation. The policy contained a clause to the effect that if the insured should fail to pay his premium note at the time it matured then the policy should cease to be in force and remain null and void during the time the note remained unpaid after maturity, but that the payment of the premium should revive the policy and make it good from the date of the payment of the premium note. This court, speaking through the present chief justice, said: "The clause referred to is not unreasonable. It is but fair and just that while the insured is in default of the payment of his [premium] note the company should not be liable for loss, when the parties have so agreed."

2. The association also requested the court to instruct the jury to the effect that if they found from the evidence

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that Burr was a member of the association, that he made the claim in suit against the association, and that such claim was disputed by the association, that then, before Burr could bring an action upon the claim, he must have procured the claim to have been arbitrated by a committee of arbitration raised as provided by the articles of incorporation of the association; and that such arbitration was a condition precedent to the right of Burr to maintain an action in the courts upon the claim. This instruction the district court refused, and correctly so. Whatever may be the rule elsewhere it is now the firmly established doctrine here that though the parties to a contract provide that if a dispute arise between them that such dispute shall be submitted to arbitration, refusal to arbitrate or no arbitration is not a defense to an action brought on such a contract by one of the parties thereto, as the effect of such agreement is to oust the courts of their legitimate jurisdiction and is contrary to public policy and therefore void. This was the rule announced in the *German-American Ins. Co. v. Ether-ton*, 25 Neb., 505. It was followed in *Union Ins. Co. v. Barwick*, 36 Neb., 223, and again reaffirmed in *Home Fire Ins. Co. v. Bean*, 42 Neb., 537. In the latter case HARRISON, J., speaking for the court, said: "A provision in a policy that no suit or action against the insurer shall be sustained in any court of law or chancery until after an award shall have been obtained by arbitration, fixing the amount due after the loss, is void; the effect of such provision being to oust the courts of their legitimate jurisdiction."

For the error of the district court in refusing to give the instruction first above quoted its judgment must be and is reversed and the cause remanded.

REVERSED AND REMANDED.

Corey v. Schuster.

ALFRED G. COREY, APPELLEE, ET AL. V. SCHUSTER,
HINGSTON & COMPANY ET AL., APPELLANTS.

FILED MARCH 5, 1895. No. 6203.

44	269
48	416
148	453
44	269
54	220
44	269
57	664
57	665
44	269
62	231

1. **Homestead: ACTION TO REMOVE CLOUD FROM TITLE: APPARENT LIEN OF JUDGMENTS: INJUNCTION.** The appellee owned a lot and building situate thereon in McCool Junction, York county. The total value of the premises was less than \$2,000. Appellee with his family occupied these premises as a homestead. Appellants recovered judgments against appellee, which were of record in the office of the clerk of the district court of said county. The judgments were not based on debts secured by a mortgage, mechanics' or vendors' liens, nor for laborers', clerks', or servants' wages. *Held*, (1) That such judgments were apparent liens upon appellee's homestead and constituted a cloud upon his title thereto, which a court of equity had jurisdiction to remove at the suit of the appellee; (2) that it was not an essential prerequisite to the maintenance of the action that the judgment creditors were threatening to cause executions to be issued and levied upon the homestead; (3) that the judgments might be used injuriously and vexatiously to harass the homestead owner and injure and depreciate his title to the property were sufficient to authorize the interposition of a court of equity.
2. —: **DWELLING HOUSE.** Appellee's building on said premises was a two-story frame building. He used the first floor for mercantile purposes and resided with his family on the second floor. *Held*, (1) Such building was a "dwelling house" within the meaning of section 1, chapter 36, Compiled Statutes, 1893, entitled "Homesteads;" (2) this statute by the word "dwelling house" does not contemplate any particular kind of house. This requirement of the law is satisfied if the homestead claimant and his family reside in the habitation, whatever be its character, on the premises claimed as a homestead.
3. —: **ABANDONMENT: EVIDENCE.** The rule is that to establish abandonment of a homestead the evidence must show not only that the party removed from the homestead, but that he did so with the intention of not returning, or, after such removal, he formed the intention of remaining away. *Mallard v. First Nat. Bank of North Platte*, 40 Neb., 784, and cases there cited, followed.

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4. ———: ———: ———. One of the issues tried in this case was whether appellee had abandoned his homestead. The evidence was that appellee, prior to the bringing of this action, leased the premises at McCool Junction for a year, the rent, by the terms of the lease, being applied to discharge a mortgage on the premises; removed with his family to a town in an adjoining county for the purpose of sending his older children to a college located there; left a part of his household goods in the building on the lot at McCool Junction; rented a house in the town removed to in which he and his family resided; that when he removed from his homestead he intended returning there; that he had not since changed that intention; that while he resided in the adjoining county he voted once therein at a general election. The district court found that appellee had not abandoned his homestead. *Held*, (1) That whether appellee at the time he removed from McCool Junction did so with the intention of returning, and whether appellee after settling in the adjoining county formed the intention of remaining away from his former homestead, were questions of fact for the trial court; (2) that by voting in the adjoining county appellee may have violated the law,—may have committed a crime,—but whether he did so was not the issue tried in this case; (3) appellee's voting in the adjoining county was evidence tending to show that when he removed from McCool Junction he did so with the intention of not returning, or that, after settling in the adjoining county, he had formed the intention of remaining away from his former homestead, but such act of appellee was not conclusive evidence of such intention; (4) that the district court was not bound to disregard all the other facts and circumstances in the case in favor of the contention of appellee and find that because he had exercised the right of suffrage in the adjoining county that such fact was conclusive evidence that he had abandoned his former homestead; (5) that the evidence supported the finding of the district court. (*Dennis v Omaha Nat. Bank*, 19 Neb., 675.)
5. ———: INJUNCTION AGAINST JUDGMENTS: DECREE. That the decree of the district court perpetually enjoining the appellants from attempting to satisfy their judgments by judicial sale of said homestead premises should be so modified as to permit appellants, at any time, to move the court for a vacation of such injunction on showing that the appellee, still owning the legal title to said premises, had permanently abandoned the premises as a homestead, or that said premises had appreciated in value so that the interest of the appellee therein had become of a greater value than \$2,000.

APPEAL from the district court of York county. Heard below before BATES, J.

The facts are stated in the opinion by Commissioner RAGAN.

A. G. Greenlee and George B. France, for appellants:

An action *quia timet* to declare a judgment not to be a lien on property claimed as a homestead and to debar the creditor from claiming such lien cannot be maintained by a judgment debtor, nor by any one, while the judgment debtor remains the owner of the property.

The property in controversy does not possess the essential characteristics of a homestead. (*Garrett v. Jones*, 10 So. Rep. [Ala.], 702; *Rhodes v. McCormick*, 4 Ia., 368.)

If the property ever was a homestead it was abandoned as such long prior to the commencement of this action. (*Bowker v. Collins*, 4 Neb., 494; *Jarvais v. Moe*, 38 Wis., 440; *Garibaldi v. Jones*, 48 Ark., 230; *In re Estate of Phelan*, 16 Wis., 79; *Warren v. Peterson*, 32 Neb., 728; *Holmes v. Greene*, 7 Gray [Mass.], 299; *Herrick v. Graves*, 16 Wis., 157; *Atchison Savings Bank v. Wheeler*, 20 Kan., 625; *Kimball v. Wilson*, 59 Ia., 638; *Cabeen v. Mulligan*, 37 Ill., 230.)

Sedgwick & Power, contra, contending that the homestead was not abandoned, cited: *Kenley v. Hudleson*, 99 Ill., 493; *Holden v. Pinney*, 6 Cal., 234; *Dunn v. Tozer*, 10 Cal., 171; *Bunker v. Paquette*, 37 Mich., 79; *Euper v. Aikire*, 37 Ark., 283; *Brown v. Watson*, 41 Ark., 309; *Wetz v. Beard*, 12 O. St., 431; *Lumb v. Wogan*, 27 Neb., 238; *Giles v. Miller*, 36 Neb., 346; *Dennis v. Omaha Nat. Bank*, 19 Neb., 675.

RAGAN, C.

On the 25th day of November, 1892, Alfred G. Corey and Mary C. Corey brought this action in the district court

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of York county, making Schuster, Hingston & Co. and Plummer, Perry & Co. defendants thereto. The Coreys in their petition alleged that they were husband and wife, residents and citizens of the state of Nebraska, had a family of five children; that they were the owners in fee-simple of lot 23, in block 48, in the town of McCool Junction, in said York county; that said real estate consisted of one lot and a dwelling house and out-buildings thereon, all of the value of not to exceed \$800; that they had occupied said premises as their homestead since June, 1885, until within about four months of the time of filing the petition, during which four months they had been living temporarily in Clay county, Nebraska, where they were educating their children, the older children being in attendance upon a college in said Clay county; that neither of them had any other homestead than the above described real estate, and that neither of them had any other real estate whatever; that the parties made defendants to the action, in the year 1891, recovered certain judgments against the said Alfred G. Corey, which judgments are of record in the office of the clerk of the district court of said York county and are wholly unpaid; that said judgments were not based on debts secured by mechanics', laborers', or vendors' liens, nor on debts secured by mortgage on said premises, but that they cast a cloud upon the title of plaintiffs to said premises and caused persons not learned in the law and not fully informed of the facts to question the title of said premises as against said judgments, to the annoyance, injury, and damage of the plaintiffs; that said premises were incumbered by a mortgage of \$300; that plaintiffs had but little means and were desirous of selling said premises for the purpose of investing the proceeds in a cheaper homestead and one not incumbered. The prayer was that said judgments and each of them might be decreed to be not liens upon the premises; that the cloud cast thereby upon the title to said premises might be removed, and the parties

made defendants perpetually enjoined from asserting or claiming a lien on said premises by virtue of said judgments. The parties made defendants to the action appeared and answered the petition. The district court found all the issues in favor of Corey and wife and entered a decree as follows: "It is hereby ordered and adjudged by the court that such judgments be, and they hereby are, declared no liens on said real estate, and said defendants are hereby enjoined from setting up any claim to or claiming any lien on said premises by reason of their said judgments." From this decree Schuster, Hingston & Co. and Plummer, Perry & Co. have appealed.

1. The first contention is that the petition does not state facts sufficient to constitute a cause of action. The argument is that these judgments do not constitute clouds upon the title to the homestead. By the provisions of our statute a homestead not exceeding in value \$2,000, consisting of a dwelling house in which the claimant resides and the land on which the same is situate, not exceeding two contiguous lots within any incorporated city or village, is exempt from judgment liens and from execution or forced sale, unless the judgment against the owner of the homestead shall be based on certain debts not material here. (Ch. 36, Comp. Stats., 1893, entitled "Homesteads.") By section 477 of the Code of Civil Procedure it is provided: "The lands and tenements of the debtor within the county where the judgment is entered shall be bound for the satisfaction thereof, from the first day of the term at which judgment is rendered," etc. It is clear then that the judgments of the appellants are apparent liens upon the homestead of the Coreys. Do these apparent liens constitute a cloud upon their title to said premises?

In *Lick v. Ray*, 43 Cal., 83, it is said: "If a title against which relief is prayed as a cloud be of such a character that, if asserted by action and put in evidence, it would drive the other party to the production of his own title in order

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to establish a defense, it constitutes a cloud which the latter has a right to call upon equity to remove."

In *Sanzay v. Hunger*, 42 Ind., 44, it is said: "When the claim set up by one to an interest in land appears to be valid on the face of the record, and the defect can only be made to appear by extrinsic evidence, particularly if that evidence depends upon oral testimony, it presents a case invoking the aid of a court of equity to remove it as a cloud upon the title." The court cites 1 Story, *Equity*, sec. 711, and *Crooke v. Andrews*, 40 N. Y., 547.

Under the jurisdiction and practice in equity, independently of statute, the object of a bill to remove a cloud upon title, and to quiet the possession of real estate, is to protect the owner of the legal title from being disturbed in his possession, or harassed by suits in regard to that title. (Mr. Justice Gray, in *Frost v. Spilley*, 121 U. S., 552; *Phelps v. Harris*, 101 U. S., 370; *City of Hartford v. Chipman*, 21 Conn., 488.)

In 3 Pomeroy, *Equity Jurisprudence*, it is said:

"Sec. 1398. The jurisdiction of courts of equity to remove clouds from title is well settled, the relief being granted on the principle *quia timet*; that is, that the deed or other instrument or proceeding constituting the cloud may be used to injuriously or vexatiously embarrass or affect a plaintiff's title.

"Sec. 1399. Whether or not the jurisdiction will be exercised depends upon the fact that the estate or interest to be protected is equitable in its nature, or that the remedies at law are inadequate where the estate or interest is legal.

* * * While a court of equity will set aside a deed, agreement or proceeding affecting real estate, where extrinsic evidence is necessary to show its invalidity, because such instrument or proceeding may be used for annoying and injurious purposes at a time when the evidence to contest or resist it may not be as effectual as if used at once, still, if the defect appears upon its face and a resort

to extrinsic evidence is unnecessary, the reason for equitable interference does not exist for it cannot be said that any cloud whatever is cast upon the title."

Applying the doctrine of these authorities to the facts of the case at bar we reach the conclusion that the judgments of the appellants are apparent liens upon the homestead of the Coreys, and as such constitute a cloud upon the title to the homestead, which a court of equity has jurisdiction to remove at the suit of the homestead owner. If the appellants should cause executions to be issued and levied upon this real estate it would require the production of extrinsic evidence on the part of the Coreys to show that such real estate was not in fact subject to the liens of such judgments. It is not an essential prerequisite to the maintenance of such an action as this that the judgment creditors should be threatening or about to cause executions to be issued and levied upon the exempt homestead. It is sufficient, to authorize the interposition of a court of equity, that the existence of the apparent liens of the judgments upon the premises may be used injuriously or vexatiously to harass the owner of the homestead and injure and depreciate his title to the property.

2. The evidence in the record shows that the building on the homestead premises of Corey was a one and one-half story frame building. The first floor of this building was used by Corey for the purpose of conducting therein a mercantile business, while he and his family resided on the second floor, which was divided into several rooms or apartments suitable for dwelling purposes. The second argument is that the building on the homestead premises was and is not a "dwelling house" within the meaning of the statute. We think this argument wholly without merit. The law does not contemplate by the word "dwelling house" any particular kind of house. It may be a "brown-stone front," all of which is occupied for residence purposes, or it may be a building part of which is used for

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banking or business purposes, or it may be a tent of cloth. All that the law requires on the subject is that the homestead claimant and his family should reside in this habitation or dwelling house, whatever be its character, on the premises claimed as a homestead.

3. The third argument is that the evidence shows that Corey and his wife abandoned the premises claimed as a homestead prior to the bringing of this suit. The evidence is that Corey and his wife resided in the upper story of the building on this lot from 1885 until within a few months before the bringing of this suit; that while they were so residing on the premises Corey conducted a mercantile business on the first floor of the building; that he failed in business and made an assignment for the benefit of his creditors; that for some time after that event he sold machinery on commission, using the building formerly used by him as a store-room for that purpose, himself and family continuing to reside in the upper story of the building; that about four months before this action was brought he leased the homestead premises for a year or a year and one-half, the provisions of the lease being such that the rents were applied to the discharge of the mortgage incumbrance upon the homestead premises; that he then removed with his family to Fairfield, in Clay county, in this state; that he went there intending to return to McCool Junction; that at the time of the removal of himself and family to Fairfield he left part of his household goods in the building on the premises claimed as a homestead in McCool Junction; that he bought no property in Fairfield; that he moved his family to that place for the purpose of sending his oldest children to a college situate there. All this evidence is practically undisputed. "The rule is, that to establish abandonment of a homestead the evidence must show, not only that the party removed from the homestead, but that he did so with the intention of not returning, or, after such removal, he formed the intention of remaining

away." (*Edwards v. Reid*, 39 Neb., 645; *Mallard v. First Nat. Bank of North Platte*, 40 Neb., 784, and cases there cited.) But Corey while living in Fairfield voted at the general election held preceding the bringing of this action; and this act of Corey in voting, it is argued by counsel for appellants, conclusively establishes either that Corey at the time he left McCool Junction left without the intention of ever returning to his homestead, or that after he settled in Fairfield he formed the intention of remaining away from his former homestead. Whether the Coreys at the time they removed from McCool Junction to Fairfield did so with the intention of returning to McCool Junction, and whether after they settled in Fairfield formed the intention of remaining there or at least of not returning to their former homestead, were questions of fact for the trial court, which it found in their favor. The fact that Corey voted while residing in Fairfield was and is a strong circumstance tending to show that he either left McCool Junction with the intention of not returning there to live, or that after he settled in Fairfield he formed the intention of remaining away from or not returning to his former homestead. But this act of Corey, though evidence of abandonment of his homestead, was not conclusive evidence of such abandonment. Corey in voting in Fairfield may have violated the law, may have committed a crime, but that was not the issue tried in this case. If Corey removed with his family from McCool Junction to Fairfield temporarily and with the intention of returning to his homestead at McCool Junction, and if after settling in Fairfield he did not abandon the intention of returning, then the mere fact that he unlawfully, illegally, or criminally exercised the right of suffrage while in Fairfield is not conclusive evidence that he had abandoned his homestead. What Corey and his wife, or either of them, said, if anything, at the time they removed from McCool Junction as to whether they were

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going away permanently or with the intention of returning the fact that they left part of their household goods at McCool Junction, the fact that they applied the rents from the McCool Junction homestead to the discharge of the mortgage upon the premises, were all facts and circumstances in evidence which tended to support the contention of the Coreys that they had not abandoned their homestead; and the fact that Corey exercised the right of suffrage while residing in Fairfield was evidence, and, as already said, very strong evidence, which tended to support the contention of the appellants that Corey had abandoned his homestead at McCool Junction when he removed therefrom; but what Corey and his wife said as to their intentions, their leaving part of their household goods at McCool Junction, and the application they made of the rent derived from the homestead, nor either of these facts, were conclusive evidence in favor of their theory, nor was the district court bound to disregard all the facts and circumstances in evidence in the case in favor of the contention of Corey and wife and say that because Corey exercised the right of suffrage while in Fairfield that all his other conduct and all the other circumstances in evidence in the case should count for nothing. Corey's voting in Fairfield should have been and was by the district court weighed and considered in connection with all the other conduct of Corey and his wife in the premises and the other facts and circumstances in evidence. (*Dennis v. Omaha Nat. Bank*, 19 Neb., 675.) The evidence sustains the finding of the district court that the Coreys did not remove from McCool Junction with the intention of not returning. The decree of the district court, however, is too broad. It perpetually enjoins the appellants from attempting to satisfy their judgments by a judicial sale of the real estate in controversy in this action. If this real estate by reason of the growth and development of the town of McCool Junction or the surrounding country, or other cause should appreciate in value until it was worth more than \$2,000, then

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the appellants would be entitled to have applied towards the satisfaction of their judgments whatever interests the Coreys had in said real estate in excess of \$2,000; and if they in the future—still owning the title to these premises—should permanently abandon such premises as a homestead, then it is clear that the appellants would be entitled to have their judgments satisfied by a judicial sale of said real estate. (*Hoy v. Anderson*, 39 Neb., 390.) The decree of the district court will therefore be so modified as to permit the appellants to at any time move the court for a vacation of the injunction granted in this case on showing that the Coreys, still owning the legal title to said premises, have permanently abandoned the premises as a homestead, or that said premises have appreciated in value so that the interest of the Coreys therein is of a greater value than \$2,000; and as thus modified the decree of the district court is affirmed.

JUDGMENT ACCORDINGLY.

**LINCOLN SHOE MANUFACTURING COMPANY V. FRANK
L. SHELDON.**

FILED MARCH 5, 1895. No. 6217.

1. Corporations: SUBSCRIPTION CONTRACTS: CONSTRUCTION. A

manufacturing corporation sued Sheldon on an instrument in writing, signed by himself and others, as follows: "For value received we, the undersigned subscribers, hereby bind ourselves to purchase the number of shares of stock set opposite our respective names in the Lincoln Shoe Manufacturing Company at fifty dollars per share; one-fourth of the amount so subscribed * * * to be paid when the foundation of the building is laid; one-fourth when the building is under roof, and the balance on call of the directors." Sheldon demurred to the petition on the ground that it did not state a cause of action. *Held*, (1) That by the contract in suit Sheldon became a subscriber to the cap-

44	279
144	587
44	279
54	409
44	279
58	648
44	279
61	126

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ital stock of the manufacturing company; (2) that Sheldon's contract was not a contract to purchase stock of the corporation; (3) and if it had been, the manufacturing company's measure of damages would be the contract price of the stock, it having tendered the stock to Sheldon before suit was brought.

2. **Sales: BREACH OF CONTRACT: DAMAGES.** Where a vendee refuses to perform the vendor has either of two remedies. He may keep the property made the subject of the contract and sue the vendee for damages for a breach of his contract, and in such case his measure of damages will be the difference between the contract price of the property and its actual value at the date of the vendee's breach of the contract; or the vendor may tender the property made the subject of the contract to the vendee, and then in a suit upon the contract the vendor's measure of damages will be the contract price of the property.
3. **Corporations: CHARTERS.** In this state the legislature does not by a special act charter a corporation, but all corporations are formed under general laws, and these laws and the articles of incorporation adopted in pursuance of and in conformity with such laws constitute the charter of a corporation in this state.
4. ———: **SUBSCRIPTION.** The fact that all the stock authorized by the articles of incorporation of a manufacturing company formed under sections 37, 38, and 39, chapter 16, Compiled Statutes, 1893, entitled "Corporations," has not been subscribed, is not a defense to a subscriber for part of such stock when sued on his contract of subscription, if ten per cent of the stock of such manufacturing corporation has been subscribed.
5. ———: ———. *Livesey v. Omaha Hotel Co.*, 5 Neb., 50, *Hale v. Sapsora*, 16 Neb., 1, and *Harde v. Platte Valley Improvement Co.*, 35 Neb., 263, distinguished.

ERROR from the district court of Lancaster county.
Tried below before HALL, J.

See opinion for statement of the case. •

Thomas C. Munger, for plaintiff in error:

It was unnecessary to allege that all the stock had been subscribed. It was sufficient to allege that more than ten per cent of the stock had been subscribed. (Compiled Statutes, ch. 16, sec. 39; Cook, Stock & Stockholders, secs. 177,

178; *Abbott v. Omaha Smelting Co.*, 4 Neb., 416; *Hunt v. Kansas & Missouri Bridge Co.*, 11 Kan., 412; *Port Edward, C. & N. R. Co. v. Arpin*, 80 Wis., 214; *Hoagland v. Cincinnati & F. W. R. Co.*, 18 Ind., 452; *Schenectady & S. P. R. Co. v. Thatcher*, 11 N. Y., 102; *Hamilton & D. P. R. Co. v. Rice*, 7 Barb. [N. Y.], 166; *Boston, B. & G. R. Co. v. Wellington*, 113 Mass., 79; *Hanover, J. & S. R. Co. v. Haldeman*, 82 Pa. St., 36; *Penobscot & K. R. Co. v. Bartlett*, 12 Gray [Mass.], 244; *New Haven & D. R. Co. v. Chapman*, 38 Conn., 65; *Illinois River R. Co. v. Zimmer*, 20 Ill., 564; *Beach, Corporations*, p. 866, sec. 535; *Hale v. Sanborn*, 16 Neb., 1.)

There was a sufficient averment to show that plaintiff was organized under the manufacturing company statute. (*Port Edward, C. & N. R. Co. v. Arpin*, 80 Wis., 217; *Morawetz, Corporations*, sec. 38; *Dorsey v. Hall*, 7 Neb., 460; *Maxwell, Code Pleading*, pp. 379, 393; *Bliss, Code Pleading*, pp. 208-213.)

The contract was a subscription. Plaintiff would be entitled to recover if it were a contract of purchase. (3 *Parsons, Contracts*, 208*; *Newark, Sales*, sec. 391; *Wasson v. Palmer*, 17 Neb., 330; *Thompson, Stockholders*, sec. 105; *Cook, Stock & Stockholders*, sec. 52; *Vanderheyden v. Mallory*, 1 N. Y., 459; *Buffalo & J. R. Co. v. Gifford*, 87 N. Y., 294; *Peninsular R. Co. v. Duncan*, 28 Mich., 130; *Oler v. Baltimore & R. R. Co.* 41 Md., 591; *Beene v. Cahawba & M. R. Co.*, 3 Ala., 660; *Penobscot R. Co., v. Dummer*, 40 Me., 172; *Haskell v. Sells*, 14 Mo. App., 91; *Cross v. Pinckneyville Mill Co.*, 17 Ill., 54; *Athol Music Hall Co. v. Carey*, 116 Mass., 471; *Hartford & N. H. R. Co. v. Kennedy*, 12 Conn., 499; *Stuart v. Valley R. Co.*, 32 Gratt. [Va.], 154; *Busey v. Hooper*, 35 Md., 28; *McClure v. People's F. R. Co.*, 90 Pa. St., 269; *Cass v. Pittsburg, V. & C. R. Co.*, 80 Pa. St., 31; *Robinson v. Jennings*, 7 Bush [Ky.], 630; *Skowhegan & A. R. Co. v. Kinsman*, 77 Me., 370; *Connecticut & P. R. R. Co. v. Bailey*, 24 Vt., 465;

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Sagory v. Dubois, 3 Sandf. Ch. [N. Y.], 466; *Minneapolis Threshing Machine Co. v. Davis*, 40 Minn., 110.)

A proposition to subscribe, even to a company to be formed in the future, is valid. (*Starrett v. Rockland Fire & Marine Ins. Co.*, 65 Me., 374; *Buffalo & J. R. Co. v. Jifford*, 87 N. Y., 294; *Minneapolis Threshing Machine Co. v. Davis*, 40 Minn., 110; *Penobscot R. Co. v. Dummer*, 10 Me., 172; *Athol Music Hall Co. v. Carey*, 116 Mass., 471; *Ashuelot Boot & Shoe Co. v. Hoit*, 56 N. H., 548; *Cross v. Pinckneyville Mill Co.*, 17 Ill., 54; *Haskell v. Sells*, 14 Mo. App., 91; *Kirksey v. Florida & G. P. R. Co.*, 7 Fla., 23.)

The subscription in this case was not to a corporation to be formed but to one then existing. The defendant is liable. (Beach, Corporations, sec. 64; Cook, Stock & Stockholders, secs. 69, 70.)

The contract should be construed a subscription. (*Spear v. Crawford*, 14 Wend. [N. Y.], 20; *Lake Ontario, A. & V. Y. R. Co. v. Mason*, 16 N. Y., 451; *Robinson v. Jennings*, 7 Bush [Ky.], 630; *Waukon & M. R. Co. v. Dwier*, 9 Ia., 121; *Skowhegan & A. R. Co. v. Kinsman*, 77 Me., 170; *Nulton v. Clayton*, 54 Ia., 425; *Connecticut & P. R. Co. v. Bailey*, 24 Vt., 465; *Sagory v. Dubois*, 3 Sandf. Ch. [N. Y.] 466; *Fry's Executor v. Lexington & B. S. R. Co.*, 2 Met. [Ky.], 314; *Starrett v. Rockland Fire & Marine Ins. Co.*, 65 Me., 374; *Kirksey v. Florida & G. P. R. Co.*, 7 Fla., 23, 68 Am. Dec., 428; *Ashuelot Boot & Shoe Co. v. Hoit*, 56 N. H., 548; *Stuart v. Valley R. Co.*, 32 Gratt. [Va.], 154; *Busey v. Hooper*, 35 Md., 28.)

Pound & Burr, contra:

The fact that the agreement was entered into after incorporation shows it to be an agreement to purchase, as it purports to be. (*Thrasher v. Pike County R. Co.*, 25 Ill., 393; *St. Paul S. & T. F. R. Co. v. Robbins*, 23 Minn., 440; *People's Ferry Co. v. Bulch*, 8 Gray [Mass.], 303.)

The measure of damages is the same as in any other

contract for the sale of personal property. In failing to state what the value of the stock was, or is, the petition fails to state a cause of action. (*Thrasher v. Pike County R. Co.*, 25 Ill., 393; *Quick v. Lemon*, 105 Ill., 578; *Rhey v. Ebensburg & S. P. R. Co.*, 27 Pa. St., 261; *Mt. Sterling Coalroad Co. v. Little*, 14 Bush [Ky.], 429; *St. Paul S. & T. F. R. Co. v. Robbins*, 23 Minn., 440.)

The whole amount fixed by the articles must be subscribed, and without an allegation to that effect no cause of action is stated. (*Hale v. Sanborn*, 16 Neb., 1; *Hards v. Platte Valley Improvement Co.*, 35 Neb., 263.)

RAGAN, C.

The Lincoln Shoe Manufacturing Company brought this suit in the district court of Lancaster county against Frank L. Sheldon. The petition, so far as material here, was in words and figures as follows:

"The plaintiff complains of the defendant and alleges that the plaintiff is a corporation duly organized and incorporated under the laws of the state of Nebraska for the purpose of manufacturing, selling, and dealing in boots and shoes of every description and kind and character and to deal in all branches common to that line of trade, and to that end to own all necessary real estate, buildings, machinery, and appliances necessary for said business, and having a capital stock of \$100,000, divided into 2,000 shares of \$50 each, of which more than ten per cent has been subscribed.

"2 That the said plaintiff corporation was organized under the general laws of the state of Nebraska relating to manufacturing corporations as well as that relating to corporations in general, as found in sections 37, 38, 39, and 123-144 of the laws of Nebraska (Compiled Statutes, 1891), and became organized and incorporated on the 10th day of February, 1890, and ever since has been, and is and was at the time hereafter mentioned, a corporation

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in fact and conducted and carried on business as such corporation.

"3. On the 22d day of March, 1890, and for the purposes of manufacturing and dealing and buying boots and shoes and for the purposes named in the first paragraph of this petition and in consideration of the advantages thereof and of each other's subscriptions the defendant, with other persons, became a subscriber to the capital stock of the plaintiff by severally executing and delivering to the duly authorized representatives and agents and officers of the plaintiff company the following agreement in writing: 'For value received we, the undersigned subscribers, hereby bind ourselves to purchase the number of shares of stock set opposite our names in the Lincoln Shoe Manufacturing Company at fifty (\$50) dollars per share; one fourth of the amount so by us subscribed respectively to be paid when the foundation of the building is laid; one fourth when the building is under roof; the balance on call of the directors. In consideration of the building being erected on the west half of the northeast quarter of section twenty-eight (28), town ten (10), range six (6), along the line of the Lincoln & Northwestern railroad. Witness our hands on this 22d day of March, 1890.'

"4. That the defendant signed and delivered the said above agreement and placed the number of shares opposite his name for which he subscribed, to-wit, the number of fifty shares for which he subscribed, and thereby agreed to take the number of fifty shares, each share being of the par value of \$50, and agreed to pay the plaintiff thereof the sum of \$2,500, as required by law and the terms of said agreement.

"5. That there was subscribed with the defendant greatly in excess of ten per cent of the said amount of capital stock as specified by the charter, and after the amount of ten per cent of the capital stock had been subscribed the plaintiff company commenced operations and adopted rules

and began the erection and equipment of a building for the purposes of the company and made preparations for the business of manufacturing and dealing in boots and shoes and bought material and acted under their charter and as an incorporation, and after as before the subscription of the defendant.

"6. The plaintiff company was formed on the 10th day of February, 1890, and the articles of incorporation were duly filed the same day, a true copy of which are hereto attached and marked 'Exhibit A' and made a part of this petition. The plaintiff accepted the subscription of the defendant and proceeded with the work and business of its charter and organization. A board of directors was chosen and the other officers necessary to the corporation and provided by its charter were elected and qualified. By and on the 10th day of June, 1890, the foundation of the building in which the operations of the company were to be carried on was laid, and on the 1st day of September, 1890, the said building was erected and under roof. This building was the same building referred to and set forth in the agreement as set forth in paragraph 3 of this petition, and was so founded and erected and roofed on the land described and along the railway named in the agreement as above set forth. And the sum of one-fourth of the said amount so agreed by the defendant to be paid became due on the 10th day of June, 1890, and the one-fourth part also became due on the 1st day of September, 1890, and the plaintiff company requested and duly demanded the payment of the said sums and offered to deliver and tendered the certificates of stock to defendant before the beginning of this action, and now offers to deliver them to defendant, amounting in all to the sum of \$1250 (twelve hundred and fifty dollars.)

"7. The plaintiff has performed all the conditions precedent in said agreement on its part. The defendant has not paid the said sum or any part thereof, and the plaintiff

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therefore prays judgment against the defendant for the sum of \$1250, as aforesaid, with interest thereon at the rate of seven per cent from the 1st day of June, 1890, on half the amount due, and from the 1st day of September on the other half due, and costs of suit."

To this petition Sheldon interposed a demurrer, the grounds of which were that the petition did not state facts sufficient to constitute a cause of action. This demurrer the court sustained, and rendered a judgment dismissing the manufacturing company's petition, to reverse which it has prosecuted to this court a petition in error.

Two arguments are relied upon here to sustain the judgment of the district court.

1. The first contention is that the contract of Sheldon made the basis of this suit is an agreement to purchase certain shares of stock of the manufacturing company, and not a subscription to the stock of such company; and that the measure of the manufacturing company's damages is the difference in the actual value of the stock and the price which Sheldon agreed to pay for it at the date of the breach of his contract; and since the petition does not allege what the value of the stock was at the date Sheldon refused to take it, that it does not state a cause of action. Is the contract of Sheldon a contract to purchase stock in the manufacturing company, or is it a contract of subscription to the capital stock of such corporation? Whether one or the other is a matter of construction for the court, and to be determined from the intention of Sheldon, gleaned from the contract itself and the law in force applicable to the subject-matter of the contract. The manufacturing company is a corporation organized under chapter 16, Compiled Statutes, 1893, entitled "Manufacturing Companies." Section 37 of that chapter provides that whenever any number of persons associate themselves together for the purpose of engaging in the business of manufacturing they shall make a certificate specifying the amount of capital stock necessary,

the amount of each share, the name of the place where the corporation shall be located, and the name by which it shall be known; that such certificate shall be certified and forwarded to the secretary of state and by him recorded; and when these things are done that the persons so associating themselves together are authorized to carry on manufacturing operations by the name they have adopted; and section 39 of the chapter provides: "The persons named in the certificate of incorporation, or a majority of them, shall be commissioners to open books for the subscription to the capital stock of said company, at such times and places as they shall deem proper, and the said company are [is] authorized to commence operations upon the subscription of ten per cent of said stock." It appears from the petition that on the 10th of February, 1890, certain gentlemen associated themselves together for the purpose of organizing the manufacturing company; that they made the certificate contemplated by said section 37 on that date and filed it with the secretary of state; and on the 22d of March afterwards Sheldon signed the contract sued upon in this case. The presumption then is that the gentlemen, or a majority of them, who executed the certificate of incorporation provided for by said section 37, after it was executed and filed with the secretary of state, opened books to enable persons, who might desire to do so, to subscribe for the capital stock of the corporation, and that the contract sued upon was made by Sheldon at such time. The law does not require that the capital stock of a corporation like this shall be subscribed before its certificate of incorporation is executed and filed with the secretary of state; indeed the statute contemplates that the certificate of incorporation shall be first made and filed and afterwards the stock books opened.

In *Haskell v. Sells*, 14 Mo. App. 91, Sells signed a paper in the following language: "We, the undersigned, hereby severally subscribe for the number of shares set opposite our respective names to the capital stock of the Mis-

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souri Cotton Seed Oil Company, a company to be organized under the laws of the state of Missouri, and we severally agree to pay the said company the sum of one hundred dollars on each share. Twenty-five per cent to be paid on organization of the company. Twenty-five per cent to be paid on first day of September. Fifty per cent to be paid on the first day of October, or as soon thereafter as the board of directors shall call for it to be paid in." The court said: "The subscription paper signed by Sells was an unconditional agreement to take a certain number of shares. This, *prima facie*, constituted the subscriber a stockholder. (Thompson, Stockholders, sec. 105.)"

In *Waukon & M. R. Co. v. Dwyer*, 49 Ia., 121, the contract sued on was in the following language: "'We, the undersigned, do hereby agree to take stock in the Waukon & Mississippi Railroad to the amount of the number of shares set opposite to our names, respectively, subject always to the by-laws, rules, and articles of incorporation of the Waukon & Mississippi Railroad.'" The court held that the contract contained a promise to pay the amount of the subscription, and that the subscriber became a shareholder of the company by virtue of the subscription. (*Hartford & N. H. R. Co. v. Kennedy*, 12 Conn., 499; *Peninsular R. Co. v. Dunnean*, 28 Mich., 130.)

The language of the contract in suit is: "We, the undersigned subscribers, hereby bind ourselves to purchase the number of shares of stock set opposite our names in the Lincoln Shoe Manufacturing Company at fifty dollars per share; one-fourth of the amount so by us subscribed, respectively, to be paid when the foundation of the building is laid; one-fourth when the building is under roof; the balance on call of the directors." While it is true that the word "purchase" is in the contract, yet we are unable to construe this contract as a contract of sale of stock. The corporation did not own any stock. The averments of the petition exclude the presumption that this

manufacturing company on the 20th of March, 1890, was the owner of any of its stock and that it agreed on that day to sell its stock or any of it to Sheldon. When we take into consideration the law under which this incorporation was organized; that it was authorized to commence business when ten per cent of its capital stock had been subscribed; that after its articles or certificate of incorporation had been filed with the secretary of state, that the persons executing such certificate had the right to open books for subscriptions to the capital stock of the corporation; that the contract bound the signer of it to pay one-fourth of the value of fifty shares of stock at fifty dollars a share when the foundation of the building to be used by the manufacturing company should be laid, and a like one-fourth when such building should be under roof, and the remainder of the value of said fifty shares at fifty dollars per share on call of the directors, we are forced to the conclusion that by the contract in suit Sheldon subscribed and agreed to pay for, in the manner stated in the contract, fifty shares of the capital stock of the manufacturing company. For the purposes of this case, however, we think it entirely immaterial whether the contract of Sheldon is one to purchase fifty shares of stock of this manufacturing company, or whether by the contract he subscribed for fifty shares of this stock. The petition alleges that before the bringing of this suit the foundation of the building to be used by the manufacturing company had been laid and such building was under roof, and that the manufacturing company demanded of Sheldon that he pay it \$1,250, the agreed value of twenty-five shares of said stock, and at the same time tendered him certificates of the stock of said corporation for the amount of money claimed. So that if we should adopt the construction of this contract claimed by Sheldon he would still be liable to the manufacturing company for the agreed price of the shares of stock. As Sheldon's having agreed to purchase fifty shares of this

stock at fifty dollars per share, and the manufacturing company having tendered him the stock, it would be entitled to recover the contract price of the stock. (3 Parsons, Contracts [5th ed.], 209.)

Wasson v. Palmer, 17 Neb. 330, was an action brought by a vendor of real estate against the vendee for the latter's breach of a contract to purchase the real estate, and this court held: "Where the vendee of real estate refuses to perform the contract on his part and an action is brought to recover damages for the breach, no tender of a deed for the property is necessary before bringing the action. The rule is different, however, where the action is to recover the contract price."

Thrasher v. Pike County R. Co., 25 Ill., 393, was an action by the railroad company against Thrasher to recover the contract price of certain shares of stock which he had subscribed for of the stock of said company. Speaking of the measure of damages the court said that an agreement to subscribe for a certain amount of stock is like an agreement to purchase any specific article of property, and if there has not been a delivery or an offer to deliver the stock, the measure of damages is not the value of the stock, but only such as would result from the loss of the sale.

In *Thompson v. Alger*, 53 Mass., 428, A. made a contract with T. for the purchase of railroad shares, and afterwards paid T. a part of the price; T. subsequently caused the shares to be transferred to A., but he refused to take them, and T. brought an action against him, and the court held that the measure of damages was the contract price.

These decisions are but applications of the well known rule that where a vendee refuses to perform his contract the vendor has either one of two remedies: he may keep the property made the subject of the contract and sue the vendee for his failure to perform, and in such case his measure of damages will be the difference between the contract price of the property and its actual value at the

date of the breach of the contract; or the vendor may tender the property made the subject of the contract to the vendee, and then in a suit upon the contract the vendor's measure of damages will be the contract price of the property.

2. The second contention is that the petition fails to state a cause of action for the reason that it shows that the whole amount of capital stock provided by the articles of incorporation of the manufacturing company has not been subscribed. To sustain this contention we are cited to *Livesey v. Omaha Hotel Co.*, 5 Neb., 50, in which it was held: "When the subscription contract or charter of a corporation specifically fixes the capital stock at a certain amount, divided into shares of a certain amount each, the capital so fixed must be fully subscribed before an action will lie against a subscriber to recover assessments levied on the shares of stock, unless there is a clear provision in the contract to proceed with the accomplishment of the main design with a less subscription than the whole amount of capital specified, or there is a waiver of the condition precedent," and *Hale v. Sanborn*, 16 Neb., 1, and *Hards v. Platte Valley Improvement Co.*, 35 Neb., 263. The general rule announced in the case in 5 Neb. was followed and adhered to in the cases in the 16th and 35th; but these cases are not in point here. In the case in 5 Neb. the corporation was a hotel company, in 16 Neb. the corporation was a flouring mill, and in 35 Neb. the corporation was organized for the erection and operation of a hall for the use of societies, organized meetings, and for such other purposes as the trustees of the corporation might deem for the benefit of the stockholders. In other words, none of the corporations were manufacturing corporations. The corporations mentioned in those cases were organized under the general incorporation laws of the state, and there is no provision in this general law by which a corporation is authorized to commence the transaction of business until all

its capital stock is subscribed. In the case at bar the corporation is a manufacturing corporation and expressly authorized by the statute under which it was incorporated to commence business when ten per cent of its capital stock should be subscribed. Cook, in his work on Stock and Stockholders, after stating the general rule that it is an implied part of a contract of subscription to the capital stock of a corporation that the contract is to be binding and enforceable against the subscriber only after the full capital stock of the corporation has been subscribed, says: "The act of incorporation may of course vary this rule. Thus, it is well established that where the charter authorizes the organization of the company, and the commencement of corporate work after a certain amount of the capital stock has been subscribed, such a charter provision is equivalent to an express authority to the corporation to call in the subscriptions as soon as this organization is effected. Subscriptions to the full amount of the capital stock are held not to be necessary. The defense is not good." (1 Cook, Stock & Stockholders, sec. 177.) In this state the legislature does not by a special act charter a corporation, but all corporations are formed under general laws, and these laws and the articles of incorporation adopted in pursuance of and in conformity with such laws constitute the charter of a corporation of this state.

In *Jewett v. Valley R. Co.*, 34 O. St., 601, the contract sued upon was in the following language: "We, the undersigned, hereby respectively subscribe to and agree to take of the capital stock of the Valley Railway Company the number of shares, of fifty dollars each, set opposite our respective signatures," etc. The capital stock of the railway company was fixed by its certificate of incorporation at three millions of dollars. Jewett subscribed for one hundred shares of its stock amounting to \$5,000. A law in force in Ohio at the time provided that railroad corporations, so soon as ten per cent of their capital stock should be sub-

scribed, might give notice to the stockholders to meet for the purpose of choosing directors and construct and maintain a railroad. The railroad company sued Jewett on his subscription, and he defended on the ground that, as the entire amount of the capital stock authorized by the certificate of incorporation had not been subscribed, he was not liable. The court said: "Can assessments be made and enforced on subscriptions for shares of the capital stock of a railroad corporation before the whole amount of stock, mentioned in the certificate of incorporation, has been subscribed? In the absence of both legislation and express agreement on the subject, they cannot." The court then cites *Salem Mill-Dam Corporation v. Ropes*, 6 Pick. [Mass.], 23, and other cases supporting the general doctrine, and continues: "In most states, however, provision has been made by statute; and it is well settled that 'contracts must be expounded according to the laws in force at the time they are made, and the parties are as much bound by a provision contained in a law as if that provision had been inserted in and formed part of the contract.' * * * A careful consideration of the enactments set forth in the statement of this case, and other cognate statutory provisions, leaves with us no doubt that when ten per cent of the capital stock had been subscribed the company may organize by the election of directors, who may 'transact all business of the corporation,' and, looking to the duties imposed on the directors, it is clear that the residue of the stock, beyond the ten per cent, * * * must 'be paid in such installments and at such times and places, and to such persons as may be required by the directors of such company,' though the whole amount of the capital stock may not have been subscribed. * * * The terms of the subscription on which this suit was brought are in harmony with the statutory provisions as we have construed them; and hence the fact that the whole of the capital stock had not been taken afforded no defense to this action." (See, also, *Hunt v. Kansas & Missouri Bridge Co.*, 11 Kan., 412.)

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We conclude, therefore, that the fact that all the stock authorized by the articles of incorporation of a manufacturing company has not been subscribed is not a defense to a subscriber for such stock when sued on his contract of subscription, if ten per cent of the stock of such manufacturing corporation has been subscribed. The judgment of the district court is reversed and the cause remanded.

REVERSED AND REMANDED.

GERTRUDE T. EDNEY ET AL. V. JAMES E. BAUM ET AL.

FILED MARCH 5, 1895. No. 5205.

1. **Assignments of Error.** Errors in the admission or rejection of testimony cannot be considered unless by assignments of error the particular rulings complained of are specified.
2. **Review: AMOUNT OF VERDICT.** A verdict will not be set aside because of the inadequacy of the damages awarded, when on one issue, if found for the plaintiff, they would be inadequate, but when the verdict may have been based on other issues calling for a smaller recovery.
3. **Trial: MISCONDUCT OF JURY.** A verdict should be set aside when it is made to appear that jurors discussed among themselves the merits of the case, expressing opinions thereon, before final submission, and where an unauthorized communication took place between a juror and one of the attorneys while the jury was deliberating. Especially should such a verdict be set aside where the evidence establishes a high probability that there was misconduct in other particulars.
4. ———: ———. In this case it was not shown that anything prejudicial occurred in the communication between counsel and juror. But prejudice will in such cases usually be presumed. The fact that there existed the opportunity and inclination among jurors to communicate with those outside the jury-room may be sufficient to vitiate a verdict.

ERROR from the district court of Lancaster county.
Tried below before TIBBETS, J.

W. J. Lamb and *R. Cunningham*, for plaintiffs in error, cited, contending that there was such misconduct both on the part of defendants below and of the jury as warranted a reversal: *Ensign v. Harney*, 15 Neb., 330; *Knight v. Freeport*, 13 Mass., 218; Thompson, Trials, sec. 2605; *Stam-pofski v. Steffens*, 79 Ill., 303; *Ortman v. Union P. R. Co.*, 32 Kan., 419; *Winslow v. Morrill*, 68 Me., 362; *Bradbury v. Cony*, 62 Me., 223; *Sanderson v. Nashua*, 44 N. H., 492; *People v. Bonney*, 19 Cal., 426.

The verdict was too small, forced, and without support in the evidence. (Thompson, Trials, sec. 2606; *St. Louis Brewery Co. v. Bodeman*, 12 Mo. App., 573; *Ellsworth v. Central R. Co.*, 34 N. J. Law, 93.)

Pound & Burr, contra, cited, contending that the facts alleged did not constitute misconduct on the part of the jury, counsel, or parties: *Clarke v. Town Council of South Kingston*, 27 Atl. Rep. [R. I.], 336, and cases there cited; *Walker v. Dailey*, 54 N. W. Rep. [Ia.], 344; *Paramore v. Lindsey*, 63 Mo., 63; *State v. Duestoe*, 1 Bay [S. Car.], 380; *State v. Cucuel*, 31 N. J. Law, 249; *Borland v. Barrett*, 76 Va., 128; *Wise v. Bosley*, 32 Ia., 34; *Gale v. New York C. & H. R. R. Co.*, 53 How. Pr. [N. Y.], 385, 393.

In such cases the presumption is that the juror acted properly, and there must be clear and convincing proof to the contrary. (*People v. Williams*, 24 Cal., 31; *Goodright v. McCausland*, 1 Yeates [Pa.], 372, 378.)

Nor is the testimony of third persons as to declarations made by jurors admissible. (*Commonwealth v. Meserve*, 156 Mass., 61; *Allison v. People*, 45 Ill., 37; *Gale v. New York C. & H. R. R. Co.*, 53 How. Pr. [N. Y.], 385; *Smith v. Smith*, 50 N. H., 212.)

The finding of the trial court upon such questions will not be disturbed. (*Ererton v. Esgate*, 24 Neb., 235; *Campbell v. Holland*, 22 Neb., 615; *Dill v. Lawrence*, 109 Ind., 564; *Borland v. Barrett*, 76 Va., 129; *Stevens v. Stevens*, 127 Ind., 560.)

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As to the amount of the verdict: *St. Louis & S. E. R. Co. v. Myrtle*, 51 Ind., 566.

IRVINE, C.

This was an action brought by the plaintiffs in error against the defendants in error to recover damages because of certain alleged false representations made by the defendants to the plaintiffs, inducing the purchase by the plaintiffs of a number of lots in the city of Lincoln. There was a verdict for the plaintiffs for \$500 after a protracted trial of the case. The plaintiffs prosecute error, arguing in their briefs only two points affecting the merits of the case.

The lots referred to formed a portion of the consideration for the conveyance by the plaintiffs to the defendants of a stock of hardware in Omaha. On the trial the defendants were permitted to offer testimony to the effect that the condition of the hardware was not as good as it had been represented by plaintiffs to be, and that it was of less value than it would have been if such representations had been true. The jury was expressly instructed that this evidence could not be considered as affecting the measure of damages, and could only be considered in determining the good faith of the parties to the transaction. Whether it was admissible for this purpose we cannot now determine, because the only assignment of error covering the subject is as follows: "That the court erred in allowing evidence to be introduced in the trial as to the condition and value of the stock of hardware. The admission of all the evidence as to its condition and value being in error, viz., the evidence introduced by defendants on said trial, and to which plaintiffs' counsel duly objected to and excepted at the time, as to the condition and value of said hardware stock, to-wit, the testimony of the witnesses David Baum, Daniel Baum, J. E. Baum, John Dennis, A. S. Carter, and H. J. McCarty as to the inventory and the condition and value of said stock." This assignment does not challenge attention to any par-

ticular ruling of the court and is too general for consideration.

The second assignment argued in the briefs is that there was error in the assessment of the amount of recovery, the same being too small. There were 130 lots conveyed. One of the representations charged was that these lots were of the value of \$200 each. This was coupled with averments of facts which plaintiffs claimed justified them in relying on this representation. If the jury had found that this representation as to value was in fact made, and that a state of affairs existed which took the case out of the general rule in regard to representations of value and justified plaintiffs in relying thereon, then it is more than doubtful whether under the evidence a verdict for so small an amount as \$500 could be sustained. But the petition charged twenty distinct false representations. Some of these were not submitted to the jury, the court deeming them evidently not actionable. Of those submitted to the consideration of the jury there were some whose truth or falsity might only slightly affect the value of the land. Because the jury found for the plaintiffs, it does not follow that it found that they were entitled to recover because of the specific representation as to value; and if the verdict was based on other representations, the evidence was not such as to demand necessarily a higher verdict than the one rendered. After the verdict was rendered the parties, except upon the two matters already discussed, seem to have abandoned the prosecution of the case upon its merits, and instead thereof there began a most unseemly trial by affidavit of the defendants, their counsel, the jury, and even the trial court. Some of the matters charged in the motion for a new trial are in implied contradiction of the record. Many of them relate to matters occurring in the presence of the trial judge, whose determination of which would not, therefore, be ordinarily interfered with. Almost every affidavit as to misconduct is met by flat contradiction. As

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to these matters, therefore, we would not disturb the finding of the district court in overruling the motion for a new trial. The perusal of the proof filed on most of the questions raised has not aided us in ascertaining the truth of the matter. The only conviction reached after reading it is that of the total unreliability of human testimony when adduced in the form of voluntary affidavits. A few facts are, however, established by uncontradicted evidence, and we think require that the judgment be reversed. They were probably lost sight of by the trial judge in the throng of repulsive and ill-founded charges which were crowded upon his attention.

The arguments to the jury were concluded on the evening of April 21st. The jury was allowed to separate and the case was committed to it on the morning of the 23d, the 22d being a holiday, Arbor day.

Peter Luther, one of the jurors, swears that William Dalstrom, another juror, during the first part of the trial frequently stated in Luther's presence that the lots in controversy were swampy and of no value, and that Mrs. Edney had been cheated, but changed his mind before the case was determined. Two other jurors, A. C. Sharrick and S. D. Eastman, testify to the same effect. J. W. Eastbrook testifies that after the trial was over he met Dalstrom, who declared to him that on Arbor day Dalstrom, with several men, went to see the property in question and inquired about the lots. This affidavit as to declarations by a juror after the verdict would of itself be of no importance, but it is entitled to some little weight in connection with the rest of the testimony. B. F. McCall, one of the jurors, testifies that he met Dalstrom on Arbor day, that Dalstrom was then intoxicated and told McCall that he was going to see the lots. George S. Overton testifies that on Arbor day he saw two men looking at the lots and they inquired of him in regard to the names of the streets and numbers of lots, and as to the value of lots in the

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neighborhood; that he had since seen Dalstrom and recognized him as one of the men he saw and talked to that day. By another affidavit Overton says that it may have been several days after Arbor day when this occurred, and that he swore to his former affidavit without accurately knowing its contents. George Scherer corroborates Estabrook as to Dalstrom's declarations. Dalstrom himself denies that he went to see the lots on Arbor day, and denies talking with Overton and Estabrook, but admits that he talked to Juror Gable on Arbor day about going to see the lots. He says he drank a few glasses of beer that day and may have indulged in idle talk with Gable and others. As to his condition on that day his own rather peculiar statement is that he "was not intoxicated and was only slightly under the influence of the beer he had drank." He practically admits having told McCall he was going to see the lots. H. W. Gable, another juror, says that during the trial Dalstrom stated that the lots were low and of no value, and that Mrs. Edney had been cheated badly; that on Arbor day Dalstrom was intoxicated and offered to hire a team at his own expense and show Gable that the lots were high and dry. He also testifies that Juror William Barr, during the early part of the trial, spoke frequently in favor of the defendant, and at one time said, "What is the use trying this case and fighting it so, a trade is a trade and ought to be, and let go at that." Barr testifies that he did not make any such statement, but that "sometimes the jurors in arguing with one another would become a little earnest, and perhaps unguarded, and say things which neither juror really meant, which is usual among jurors." If the only feature of this evidence was the alleged visit of Dalstrom to the lots we would hardly feel justified in setting aside the finding of the district court on that point, although we think from the affirmative evidence, from the proof as to Dalstrom's condition, and from his own admissions, that the weight of the evidence is that he took this

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private view of the property. But aside from this the affidavits clearly show that before the case was submitted to the jury, jurors discussed its merits among themselves and expressed opinions in regard to the rights of the parties. It is made the duty of the court to admonish the jurors, when permitted to separate during the trial, against such conduct, and it is presumed that the court did its duty in this respect.

The proof on another point is worthy of comment. E. M. Wolfe states that during the deliberations of the jury he was in company with one of the attorneys for the defendants and while beneath the window of the room within which the jury was deliberating the window was opened. Two of the jurors stood in the window when affiant's companion raised his hands and said, "Throw it down to me and I will catch it—the verdict, I mean." A juror said, "We will have the verdict in a few minutes." The attorney referred to testifies that Juror Sharrick addressed, from the window, Wolfe and the affiant, saying, "We will be down in a few minutes." Wolfe and affiant stopped and in imitation of a ball player affiant said, "I can catch it." This occurrence is suspicious, not because of the language used on this occasion, because the conduct of the attorney referred to seems at most to have been indiscreet, but because it evinces both a disposition and an opportunity on the part of the jurors to discourse with outsiders. Prejudice will usually be presumed from such communications. (*Veneman v. McCurtain*, 33 Neb., 643.)

We think that the proof discloses such irregularities in the way of communications among the jurors and with others as to demand that the verdict be set aside, and while we are loath to encourage the practice of assailing the adverse party and jurors after an unfavorable verdict, we are the less reluctant in setting this verdict aside because of the fact that some five or six of the jurors have filed affidavits stating that their minds never assented to the verdict, but

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that they were induced to acquiesce therein to avoid further confinement. The portions of the affidavits relating to this were struck out by the district court, and properly so, as being incompetent for the purpose of impeaching the verdict. But the fact that the affidavits were filed moves us to say that these jurors were evidently utterly regardless of their oaths. Each one violated his oath, either as a jurymen or else in making the affidavit. While the verdict could not be set aside on this ground the fact that the case was tried by a jury embracing so many men of this character renders us, we repeat, the less reluctant in setting aside the verdict on other grounds. To those interested in the case it may be proper to suggest that in further proceedings it will be well to avoid all conduct calculated to arouse even a suspicion of evil.

REVERSED AND REMANDED.

C. S. WEBSTER V. JOHN D. DAVIES.

FILED MARCH 5, 1895. No. 6022.

Limitation of Actions: RESIDENCE IN ANOTHER STATE.

Under section 21 of the Code of Civil Procedure, providing that "when a cause of action has been fully barred by the laws of any state or country where the defendant has previously resided, such bar shall be the same defense in this state as though it had arisen under the provisions of this title," an action is barred in this state when the defendant has resided in another state for the full period of limitations under the laws of that state, even though the cause of action arose here and the defendant resided here when it arose.

ERROR from the district court of Platte county. Tried below before MARSHALL, J.

McAllister & Cornelius, for plaintiff in error.

Albert & Reeder, contra.

IRVINE, C.

The question presented in this case is the construction of sections 18, 20, and 21 of the Code of Civil Procedure in relation to limitations of actions. Webster sued Davies on several promissory notes made by Davies and maturing in 1884, 1885, and 1887. The action was brought in the district court of Platte county on June 21, 1890. Davies answered that on June 21, 1890, and for more than three years prior thereto, he had been a resident of Wyoming; that each of the notes was executed and delivered in the state of Nebraska while Davies was a resident of this state. He then pleaded a statute of Wyoming to the effect that such actions on contracts expressed or implied, contracted or incurred before the debtor became a resident of Wyoming, shall be commenced within two years after the debtor shall have established his residence in Wyoming. The reply was a general denial. The only evidence was the statute pleaded by the defendant and the testimony of the defendant himself, which shows that in 1887 he went to Wyoming in the employ of a railroad company, going first to Wiser, then moving to Laramie, where he bought a home, then to Green River, where he bought another home, thence to Rock Springs, thence to Millis, remaining altogether at these different points in Wyoming about three years; that he went to Wyoming because he was employed by the railroad company and went from place to place in Wyoming as directed by that company, but he left with the intention of making his home in Wyoming and without any intention of returning to Nebraska. Shortly before this action was brought his father died and he thereby inherited property in Nebraska, and for that reason returned. The court found generally for the defendant and entered judgment accordingly.

The evidence referred to was ample to sustain a finding that the defendant had resided in Wyoming for more than two years, and the statute of Wyoming introduced in evidence provided that where an indebtedness of this character arose before the defendant went to Wyoming action must be brought thereon within two years. The question is, therefore, presented whether, when a contract is made and is performable in Nebraska, the defendant being a resident of Nebraska at the time, and he afterwards removes to another state, remaining there until an action on the contract would be barred by the laws of that state, and then returns to Nebraska, the action is also barred here. Sections 18, 20, and 21 of the Code of Civil Procedure are as follows:

“Sec. 18. All actions, or causes of action, which are or have been barred by the laws of this state, or any state or territory of the United States, shall be deemed barred under the laws of this state.”

“Sec. 20. If, when a cause of action accrues against a person, he be out of the state, or shall have absconded or concealed himself, the period limited for the commencement of the action shall not begin to run until he come into the state, or while he is absconded or concealed; and if after the cause of the action accrues he depart from the state, or abscond, or conceal himself, the time of his absence or concealment shall not be computed as any part of the period within which the action must be brought.

“Sec. 21. When a cause of action has been fully barred by the laws of any state or country where the defendant has previously resided, such bar shall be the same defense in this state as though it had arisen under the provisions of this title.”

Where similar statutes are in force there was formerly much doubt because of the apparent conflict between section 20 and the other sections quoted; but it has been quite generally decided that the provision of section 20 which tolls the statute during the absence of a defendant from the

state does not apply where his absence has been of such a character as to entitle him to the benefit of the statute of limitations of another state to which he has removed. This court has so construed the law. (*Hower v. Aultman*, 27 Neb., 251; *Minneapolis Harvester Works v. Smith*, 36 Neb., 616; *Harrison v. Union Nat. Bank*, 12 Neb., 499.) None of these cases, however, presented the question which we now have before us. Plaintiff in error argues that sections 18 and 21 apply only where the cause of action arose in another state and became there barred, and that they do not apply to a case which arose in this state while the defendant was here a resident and where the bar of the foreign statute was created by his removal from this state after the cause of action arose. This view has the apparent support of the supreme courts of Tennessee and Montana. (*Bagwell v. McTighe*, 85 Tenn., 616; *Kempe v. Bader*, 86 Tenn., 189; *Chevrier v. Robert*, 6 Mont., 319.) But the statute of Tennessee is: "Where the statute of limitations of another state or government has created a bar to an action upon a cause accruing therein, whilst the party to be charged was a resident in such state or under such government, the bar is equally effective in this state." In order, then, that the statute of another state might be effectual this statute required both that the cause of action should have accrued therein and that the defendant should have been a resident thereof. In Montana the statute is: "When the cause of action shall have arisen in any other state or territory of the United States, or in any foreign country, and by the laws thereof an action cannot be maintained against a person by reason of the lapse of time, no action thereon shall be commenced against him in this territory." In the case cited the debt was contracted in Canada and the defendant removed thence to Nevada, remaining there long enough for the Nevada statute to bar an action, and then came to Montana. The court thought that the cause of action did not, in the language of the statute,

"arise" in Nevada and considered that to so construe the statute would be unjust and unreasonable. But on the other hand the appellate court of the first district of Illinois, construing a similar statute, held directly to the contrary. (*Humphrey v. Cole*, 14 Ill. App., 56.) In that case the instrument sued on was made by the defendant in Illinois while he resided there. He then came to Nebraska, where he remained more than twenty years, returning to Illinois, where action was brought. The court, citing an unreported decision of the supreme court, said that the words in the Illinois statute, "when a cause of action has arisen," should be construed as meaning when jurisdiction exists in courts of a state to adjudicate between the parties upon a particular cause of action if properly invoked, without regard to the place where the cause of action had its origin. Judge Blodgett, following the same authority and using the same language, construed the statute in the same manner. (*Osgood v. Artt*, 10 Fed. Rep., 365.) Our statute does not, in either section 18 or section 21, require that the cause of action should have arisen in the state the benefit of whose statute is claimed, and this case might be resolved for the defendant for this reason on the authority of either the Montana, the Illinois, or the federal case. The statute of Iowa was formerly in the same language as our own. We cannot find that while the statute so remained it received any construction upon this point, but in 1870 there was added to the section corresponding to our section 21 the following words: "This section shall not apply to causes of action arising within this state." The supreme court then intimated in several cases that under states of facts like those of the case now before us the statute did not operate, but it was held inapplicable solely because of the amendment of 1870. (*Lloyd v. Perry*, 32 Ia., 144; *Davis v. Harper*, 48 Ia., 513.) The same court held more definitely that the amendment was not retroactive, and that where a cause of action arose in Iowa and the defendant afterwards became

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entitled to the benefit of the statute of another state by residing there for the full period of limitations, he could plead that statute in bar of the action in Iowa, notwithstanding the amendment of 1870, the bar having arisen before that amendment. (*Thompson v. Read*, 41 Ia., 48; *Goodnow v. Stryker*, 62 Ia., 221.) These decisions show that the Iowa court deemed an express exception necessary in order to justify the construction for which the plaintiff in error contends. Indiana formerly had the same statute, and it was there held that the fact that a note was payable in Indiana and that the defendant resided there when the cause of action arose was not a good replication to an answer pleading the bar of the statute of another state. (*Wright v. Johnson*, 42 Ind., 29; *Van Dorn v. Bodley*, 38 Ind., 402.) After these decisions the legislature adopted an amendment similar to the Iowa amendment, and the court held that because of this amendment the rule was changed. (*Mechanics' Building Association v. Whitacre*, 92 Ind., 547.) We think it is immaterial under our statute, as it was in Iowa and Indiana before the amendments referred to, where the cause of action arose or where the defendant resided when it arose. If he has resided in another state so long as to be protected by the statute of that state, such fact is a good defense to an action here.

JUDGMENT AFFIRMED.

POST, J., not sitting.

FIRST NATIONAL BANK OF WYMORE, APPELLANT, V.
JAMES D. MYERS ET AL., APPELLEES.

FILED MARCH 5, 1895. No. 5250.

1. **Fraudulent Conveyances: EVIDENCE.** In an action by an attaching creditor of a mortgagor to vacate the mortgage for fraud plaintiff pleaded that "on the 17th day of April, 1890, and

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before the levy of the attachment * * A and B conveyed " the land to the mortgagee. This the answer admitted. *Held*, That evidence that the mortgage was not delivered until after the levy of the attachment was irrelevant and foreign to the issues.

2. ———: PLEADING. In such case a general averment in the answer denied in the reply that the mortgage was prior to all other liens, does not prevail against the specific pleading of fact, and does not put the date of delivery of the mortgage in issue.
3. Amendments will not be allowed after judgment where their effect would be to substantially change the cause of action or defense.
4. Amendments will not be allowed where to do so would prejudice the rights of the adverse party.
5. *Stare Decisis*. *First Nat. Bank of Wymore v. Myers*, 38 Neb., 152, reaffirmed.

REHEARING of case reported in 38 Neb., 152.

A. D. McCandless and *S. J. Tuttle*, for appellant, cited, on the question of amendment: *Humphrey v. Spafford*, 14 Neb., 488; *Homan v. Steele*, 18 Neb., 652; *Pomeroy v. White Lake Lumber Co.*, 33 Neb., 240; *Anglo-American Land, Mortgage & Agency Co. v. Brohman*, 33 Neb., 409.

Griggs, Rinaker & Bibb and *R. W. Sabin*, contra.

IRVINE, C.

An opinion was written in this case affirming the judgment of the district court and filed November 8, 1893. (*First Nat. Bank v. Myers*, 38 Neb., 152.) The nature of the case is there briefly stated. The inquiry was then directed solely to whether a sufficient consideration had been shown for the conveyances to Holt. On a motion for a rehearing it was urged that the proof disclosed that while the conveyances to Holt were dated and filed for record before the levy of plaintiff's attachment, still the conveyances had been made without the knowledge of the grantee, had been

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filed for record by the grantor, and were not delivered to the grantee until after the levy of the attachment, the grantee not till then knowing of their existence or their delivery. It was argued that under this state of the evidence the lien of the attachment was superior to that of the mortgages. It seeming that this phase of the case had probably not received proper attention, a rehearing was allowed. The case has been reargued, and having considered all the questions presented, we see no reason for reaching a conclusion different from that reached on the former hearing. It is true that there is in the record evidence tending to show a state of facts in regard to the delivery of the mortgages in accordance with the argument of the appellant. All material portions of this evidence were admitted over the objections of the appellees on the ground that the testimony was irrelevant under the pleadings. The petition, after alleging the levy of the plaintiff's attachment on May 10, 1890, and the subsequent entry of judgment in the attachment case, avers "that on the 17th day of April, A. D. 1890, and before the levy of the attachment and the rendition of a judgment in this case, the said James D. Myers and ——— Myers, his wife, defendants, conveyed the following of the said above described property to one Charles B. Holt," etc. Similar allegations are then made in regard to the other conveyances. The gist of the action lay in the subsequent averment that these conveyances were made without consideration and for the purpose of hindering and defrauding the plaintiff and other creditors of James D. Myers.

The answer of Myers admitted the making of the conveyance in the words of the petition as above quoted, and the answer of Holt contained a similar admission. Both answers joined issue in regard to the consideration and purpose of the conveyance. So far as we have quoted the pleadings, then, it stood admitted of record that the land had been conveyed prior to the levy of the attachment.

The date of the delivery of the conveyance was, therefore, not put in issue and the testimony on that point was for that purpose irrelevant. Counsel now contend that certain averments in the answer and reply formed an issue on this subject. The answer of Holt, after admitting the conveyance on the 17th of April and denying that it was made without consideration or for the purpose of defrauding creditors, avers affirmatively the nature of the consideration and the purpose of the conveyance, and then proceeds, "this defendant has a first and valid lien upon said premises so conveyed to him as aforesaid by the defendants James D. Myers and Elizabeth A. Myers, his wife, which said lien is prior and superior to any lien or interest which the plaintiff or any of this defendant's co-defendants have in, to, or upon said premises or any part thereof." The substantive part of the reply is that the plaintiff "denies each and every allegation of new matter" in the answer contained. The contention is that the allegation in the answer that Holt's mortgage was superior to any lien of the plaintiff, together with the denial of that allegation in the reply, made an issue to which all facts affecting the priority of the mortgage became relevant; but we cannot attach to this general allegation any such force. It pleads merely a conclusion of law, and the pleading of a conclusion of law in such a general form cannot be allowed to prevail as against the distinct pleading of specific facts.

The appellant asks that in case the court should reach the conclusion above stated it be permitted to now amend its petition in such manner as to present an issue upon the date of the delivery of the conveyance in question. It has been quite recently held (*Scott v. Spencer*, 44 Neb., 93) that an amendment after judgment will not be permitted where its effect is to make a substantial change in the cause of action or defense presented by the pleadings upon the trial. The plaintiff's petition was in the nature of a creditor's bill attacking the validity of the

Holt mortgage on the ground that it was without consideration and made to defraud creditors. If we should permit it now to amend as desired it would state a cause of action not only to vacate the mortgage on the ground of fraud, but also to marshal liens upon averments to the effect that the real priorities were other than would appear from an inspection of the public records. This would be to permit a substantially different cause of action to be stated by amendment after judgment. The Code permits amendments in furtherance of justice. In construing this provision the rights of the party seeking to amend are not alone to be considered. The court in permitting amendments must be careful not to sacrifice the rights of the other party. To do so would not be in furtherance of justice. Mr. Holt resided, at the time of the trial, in Tioga county, New York. He was seventy-five years of age. His testimony was taken by deposition. The defendants examined him solely in regard to the issues made by the pleadings. It is true he was briefly cross-examined in regard to the delivery of the mortgage, but the defendants did not re-examine on this point, nor were they called upon to do so in view of the issues as then framed. To permit the amendment now sought might deprive the defendants of the opportunity of presenting evidence upon the issue so interpolated.

One more point, perhaps, ought to be mentioned. The former opinion was addressed solely to the existence of a consideration. It was also claimed that the evidence showed that an actual intent to defraud existed in making the conveyances. We have examined the evidence on this point and think it amply sustains the finding of the trial court that the mortgage was made in good faith.

JUDGMENT AFFIRMED.

LUCIEN WOODWORTH V. F. L. THOMPSON.

FILED MARCH 5, 1895. No. 5207.

1. **Evidence examined, and held sufficient to sustain the verdict.**
2. **Landlord and Tenant: PAROL AGREEMENT FOR REPAIRS.**
Where a tenant is not obligated by his lease to make any particular repairs a subsequent parol agreement, whereby certain extensive repairs are agreed upon, the landlord promising to pay the cost thereof above a certain sum, is valid and will be enforced.
3. ———: ———: **CONSIDERATION.** In such case the making of the repairs by the tenant and his promise to pay a portion of the cost constitute a sufficient consideration for the landlord's promise.
4. **Depositions: OBJECTIONS FIRST RAISED AT TRIAL.** It is not reversible error for the trial court to refuse to strike out a portion of the answer of a witness in a deposition because the answer stated the witness' conclusion as to the effect of the language used by one whose conversation is related, instead of repeating the language itself, the answer being probative in its character and material to the issues, and no objection having been made until the deposition was read at the trial.
5. **Pleadings: AMENDMENTS: USE OF ORIGINAL IN ARGUMENT.**
Where an amended pleading has been filed the original loses its force as a pleading, and the adverse party may not read it to the jury or comment upon it in argument without first offering it in evidence.

ERROR from the district court of Douglas county. Tried below before DAVIS, J.

Brown & Talbott, for plaintiff in error.

Brome, Andrews & Sheean, contra.

IRVINE, C.

The plaintiff in error brought suit against the defendant in error, charging in the first count of his petition that

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Woodworth had rented to Thompson a hotel building in Omaha at a rental of \$300 per month, and that upon the rent so reserved there was \$1,100 due and unpaid. In the second count it was charged that Woodworth had leased to Thompson a piano at a rental of \$5 per month, and that \$50 was due on this account. Judgment was prayed for these two amounts.

The second amended answer, on which the case was finally tried, was to the effect that after Thompson entered into possession Woodworth, desiring to have certain repairs made, employed Thompson to procure the same to be made and agreed to pay the reasonable price therefor beyond the sum of \$500; that Thompson caused such repairs to be made to the reasonable value of \$1,750, whereby there became due him from the plaintiff \$1,250. Answering the second count of the petition, Thompson averred that the rental price of the piano was \$4 per month, and that prior to the expiration of the first month the lease therefor was terminated, but the piano was allowed to remain at the hotel at the request of Woodworth. Thompson admitted that there was due to Woodworth \$1,104, and asked judgment for the difference between that sum and \$1,250. There was a verdict for the defendant for \$172.70. From this the defendant remitted \$27.80, and on overruling the motion for a new trial judgment was entered for \$144.90, from which judgment the plaintiff prosecutes error.

The plaintiff in error argues that the verdict is not sustained by the evidence. The original lease was in writing and contained a provision as follows: "All improvements on the second story to be made by the party of the second part," Thompson. But the testimony of Thompson was to the effect that the so-called improvements then contemplated, were of a minor character, and after they had been begun it was found necessary or advisable to make very extended repairs. In particular that it was found necessary to renew the plumbing throughout the whole build-

ing. Thompson did not feel like undertaking such extensive repairs and thereupon he proposed to Woodworth that the repairs should be made; that he, Thompson, would bear the expense up to \$500, and Woodworth the remainder. Woodworth agreed to this. This testimony is flatly contradicted by Woodworth, and, perhaps, if the case were presented to us to decide in the first instance we would consider the weight of the evidence in favor of Woodworth, but there was sufficient evidence to sustain Thompson's theory. In this connection the plaintiff in error argues that if such a contract were established it would be void for want of consideration. In support of this proposition several cases are cited to the effect that for one to agree to do what he is already bound to do, or for one to waive a legal obligation on the part of the other, is *nudum pactum*; but that is not this case. The lease did not require any particular repairs or improvements to be made. Thompson was not obliged to make any improvements, and the agreement to make and in part pay for the particular improvements which were made was a sufficient consideration for Woodworth's promise to pay for the remainder. The deposition of Thompson was read in evidence. This question was asked, "You may now state what conversation or conversations you had with the plaintiff concerning the improvements to be made on the hotel property, and when and where the conversations were had." The witness then proceeded at great length, and without objection, to answer this question. Near the close of his answer he states the proposition which he made to Woodworth in regard to repairs, and proceeds as follows: "This he agreed to do, and he was knowing to all the work that was done. All of it was necessary to the good of the house, and he got the benefit of it all." When the deposition was offered in evidence on the trial, and not before then, objection was made to so much of the answer as we have quoted. This was overruled, and complaint is made of the ruling of the court in that regard.

t the statement, "This he agreed to do," of a conclusion merely and incompetent. ot stating the effect of any agreement, used was equivalent merely to a statement assented to Thompson's proposition. as should have been required, if possible; but while our Code allows exceptions for incompetency to be made at the trial, still, where the objection is of this kind, relating to the form of a question or answer, and not only a portion of an answer to a question, but a narrative statement, and no objection being made to that question, the court is justified in sustaining the objection when made for the first time on the trial, even though the portion of the answer is not strictly competent. This objection to a portion of an answer to a question, and an answer in such form is similar to a question, but incompetent testimony after it has been given, the answer being material and of a probative character should not be struck out where no objection is made, but by objection to the form when the question is asked, in order to establish the same fact in a more

likely to two or three rulings whereby the testimony to the effect that Woodworth had been present throughout their progress. It is only an error which was immaterial. We do not think the error can be entitled to very little weight, especially when accompanied as it was by some proof to show that Woodworth exercised supervision over some of the witnesses, and to throw light upon the transaction and the conduct of the defendant.

The plaintiff in error complains because the trial court permitted his counsel to read to the jury in the charge certain allegations in the first

amended answer. The record shows that the defendant offered testimony to explain the differences between the first amended answer and the second amended answer on which the case was tried. This evidence the court excluded unless the first amended answer was offered in evidence. It was not offered in evidence, but the defendant undertook to read it to the jury and comment upon it. The court forbade this procedure, and without doubt correctly. Counsel cite us to *Colter v. Calloway*, 68 Ind., 219, and *Holmes v. Jones*, 121 N. Y., 461. These cases hold that the pleadings are a part of the record and open to the comments of counsel and consideration of the jury, although not offered in evidence; but both cases, as well as those of *White v. Smith*, 46 N. Y., 418, and *New Albany & Vincennes Plank Road Co. v. Stallcup*, 62 Ind., 345, were cases where the question arose as to pleadings upon which the case was tried and not pleadings which had been superseded by amendment. Where a pleading has been so superseded and an amended pleading has been filed the original ceases to perform any office as a pleading, and the party is no longer estopped by its allegations. It is not such a part of the record as to be open to the inspection and criticism of the jury, but it may be offered in evidence by the adverse party merely as an admission, not conclusive, but open to explanation and rebuttal. (*Johnson v. Powers*, 65 Cal., 179; *Boots v. Canine*, 94 Ind., 408; *Strong v. Dwight*, 11 Abb. Pr., n. s., [N. Y.], 319.) "It has been over and over again decided that when pleadings are superseded by amendment they must be brought again before the court by some appropriate method; in such a case as this that method is by offering them in evidence." (*Boots v. Canine*, *supra*.) This court has tacitly recognized this rule. (*Bunz v. Cornelius*, 19 Neb., 107; *McGarvock v. City of Omaha*, 40 Neb., 64.) If counsel had desired to avail themselves of any admission in the first amended answer, they should therefore, have offered it in evidence and so afforded the defense an opportunity

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of meeting it. Not having done so, they had no right to read it to the jury or comment upon it.

JUDGMENT AFFIRMED.

HENRY LINGONNER V. GLAUCUS S. AMBLER.

FILED MARCH 5, 1895. No. 6346.

1. **Statutes: CONSTRUCTION.** When two independent statutes are not necessarily in conflict, the later will not be construed as creating an exception to the operation of the earlier.
2. **Animals: HERD LAW: METROPOLITAN CITIES.** The herd law (Comp. Stats., ch 2, art. 3) is applicable to cultivated lands within the limits of cities of the metropolitan class, notwithstanding the charter of such cities granting power to the mayor and council by ordinance to provide for impounding animals running at large.
3. **Estoppel.** To create an estoppel *in pais* the party in whose favor the estoppel operates must have altered his position in reliance upon the words or conduct of the party estopped.
4. **Animals: EVIDENCE OF TRESPASS.** Evidence held sufficient to sustain the verdict.

ERROR from the district court of Douglas county. Tried below before KEYHOB, J.

David Van Etten, for plaintiff in error.

George O. Calder, contra.

IRVINE, C.

This case originated before a justice of the peace and grew out of the failure of the parties to reconcile between themselves a difference of \$2.50. It is true that the constitution guaranties the right to be heard in the court of

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last resort in any civil action, but litigants should be in some manner discouraged from taking advantage of this provision in cases where the amount involved is trivial and no question of law of importance to the parties is presented. It should be remembered that the cost bill which the defeated party ultimately has to pay forms but a small portion of the real expense of litigation. The state and the counties, in the way of fees to jurors and salaries of judges and other court officers, bear the great burden of litigation. The crowded condition of the dockets, causing a delay amounting in some cases to a practical denial of justice, is largely due to the persistent prosecution of such cases as this. Ambler was the owner and resided upon a tract of land within the limits of the city of Omaha, but near the western border thereof. On a certain Sunday afternoon his rest and meditations were disturbed by observing five black hogs rooting up the blue grass on his lawn. He called assistance and took up the hogs *damage feasant*. It turned out that they were the property of Lingonner, who came upon the scene shortly after and inquired the amount of damages which Ambler claimed. Ambler asked \$5. Lingonner thought this too high and offered \$2.50. The next day Lingonner replevied the hogs. Ambler served a notice upon him as provided by the herd law, Compiled Statutes, chapter 2, article 3, section 3. Whether this notice was served before or after the hogs were replevied is doubtful, but we do not think important. Ambler had judgment before the justice, and again on appeal in the district court, the value of his interest being found in the latter court at \$5. From this judgment Lingonner prosecutes error.

The principal question presented is that of the applicability of the herd law to cities of the metropolitan class. The plaintiff in error contends that the law is not applicable to such cities and that as to them it has been superseded by the city charter, Compiled Statutes, chapter 12a, section 34. The section referred to gives the mayor and council power

to prohibit or regulate the running at large, or the herding or driving of domestic animals within the corporate limits, and to provide for the impounding of all animals running at large, herded, or driven contrary to said prohibition; and also for the forfeiture and sale of animals impounded to pay the expenses of taking up, caring for, and selling the same. We think this statute in nowise limits the operation of the herd law. In the first place, our present herd law was intended to provide a general law for the state, and to supersede a number of special and local acts theretofore existing on the subject. Its title is "An act for a general herd law to protect cultivated lands from trespass by stock." (Laws, 1871, 120.) The law was certainly intended to apply generally throughout the state, except in certain counties then unsettled and especially exempted from its operation. It is, therefore, applicable to lands within cities unless the section of the charter of metropolitan cities already referred to operated as an implied amendment. Leaving out of consideration the question as to whether the legislature, in an act for the incorporation of cities, could, under our constitutional provision, by implication amend another general law such as the herd law, we do not think that the charter should be construed as such an amendment. Repeals by implication are not favored, and a later act will not be construed as repealing, by implication, a former act where it is possible that they may stand together. The same rule obtains in regard to implied amendments which would have the effect of carving out exceptions to the former law. There is no necessary conflict between the herd law and the charter provision. The former was designed to protect owners of cultivated lands from the depredations of domestic animals and to afford an adequate and speedy civil remedy therefor by way of creating a lien on the stock doing the damage, and providing an easy method of its enforcement. Section 34 of the charter is plainly a police regulation giving to the mayor and council power to pro-

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tect the public against the excursions of domestic animals and authorizing the sale of animals impounded, not for the payment of any damage to individuals, but solely to defray the expense of enforcing the ordinance adopted under the grant of power conferred by the act.

It is next urged that the defendant was estopped from claiming the statutory lien because of a statement made by him to the plaintiff in the conversation during which the disagreement arose as to the amount of damages. The story is thus told by the plaintiff as to what occurred: "I say, 'How you do, Mr. Ambler? You sent your man over;'" and I said, 'I heard you sent your man over, and that you had some of my hogs taken up.' No, I say this way: 'You send your man. I heard you got some of my hogs taken up;'" and Mr. Ambler say, 'Yes, they yours;'" and I say, 'How did you get them?'" He say, 'I got them right out of your pasture, and drive them into my yard, and pen them up.'" I say, 'Did they done any damage at the time you drive them over and pen them up?'" He say, 'No, they didn't do a great deal of damage.'" I say, 'What you want from your trouble?'" He say, 'I want five dollars to-day and ten dollars to-morrow.'" I say, 'No, that too much; not \$2.50 enough?'" He say, 'No, I got edge of you now. Last summer your cow was in my granary, and I got the edge of you now.'" I say, 'If you won't take \$2.50, that is all right.'" Ambler admits that he told Lingonner that he had driven the hogs out of the hog pasture into his own yard, but says he considered Lingonner's question so ridiculous that he made this answer by way of a joke. We presume that even Mr. Ambler will not now insist that this was a very brilliant piece of humor, but we cannot agree with the plaintiff that the punishment for it should be by holding him estopped from now claiming the fact to be otherwise. To constitute an estoppel *in pais* the party in whose favor the estoppel operates must have altered his position in reliance upon the conduct of the

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other party. It is very evident that Lingonner did not rely upon Ambler's statement, for according to his own testimony he immediately inquired about the damage and offered to pay \$2.50 in satisfaction.

It is urged that the judgment must fail for want of proof of the value of the hogs. The point made is that while Ambler's interest must be limited to the damage sustained by him, still, if the hogs themselves had a value less than that damage, his interest would also be limited by the value of the hogs. The point is not important, because the plaintiff alleged in his petition that the hogs were of the value of \$25, and he is estopped by that averment.

It is argued also that the evidence is insufficient to show that the hogs were trespassing, and that it is insufficient to establish the damages allowed. These points involve no question of law and we shall not discuss the evidence on the subject. We think it is sufficient on both points.

JUDGMENT AFFIRMED.

PACIFIC MUTUAL LIFE INSURANCE COMPANY V. MARTIN C. FRANK.

FILED MARCH 5, 1895. No. 5841.

Accident Insurance: ACTION TO REFORM POLICY: EVIDENCE: AUTHORITY OF AGENT: CIRCULARS: ESTOPPEL. Suit was brought to reform a policy of accident insurance by inserting a provision in accordance with the verbal contract between the insurer's agent and the insured. The provision which it was sought to insert was to the effect that in case of the loss of one foot the insurer would pay one-third of the principal sum. The insurer defended on the ground that its agents were forbidden to write policies of that character in favor of persons already crippled when the policy was written. *Held*, (1) That the evidence sustained a finding for plaintiff; (2) that circulars issued

by authority of the insurer and brought to the notice of the insured before the policy was written were admissible in evidence where they advertised that the insurer wrote policies paying one-third for the loss of one foot, and stated no restrictions as to persons in whose favor such policies should be written; (3) that such circulars were admissible to show that the insurer had held its agent out as authorized to write such policies to all persons; (4) that the insurer having so held out its agent as authorized to write the policy, it is estopped from now denying his authority.

ERROR from the district court of York county. Tried below before WHEELER, J.

Charles O. Whedon and Charles E. Magoon for plaintiff in error:

A policy which does not conform to the agreement of the parties, whether by fraud or mistake, may be reformed in equity, and damages for a loss decreed in the same case; but such non-conformance must be conclusively proved. (*Milligan v. Pleasants*, 21 Atl. Rep. [Md.], 695; *Cooper v. Farmers' Mutual Fire Ins. Co.*, 50 Pa. St., 299; *Patterson v. Benjamin Franklin Ins. Co.*, 81 Pa. St., 454; *Mead v. Westchester Fire Ins. Co.*, 64 N. Y., 453; *Bryce v. Lorillard Fire Ins. Co.*, 55 N. Y., 240; *Van Tuyl v. Westchester Fire Ins. Co.*, 55 N. Y., 657; *National Fire Ins. Co. v. Crane*, 16 Md., 260; *Tesson v. Atlantic Mutual Ins. Co.*, 40 Mo., 33; *Hearne v. Marine Ins. Co.*, 20 Wall. [U. S.], 490; *Snell v. Atlantic Fire & Marine Ins. Co.*, 98 U. S., 85.)

Statements in a pamphlet issued by an insurance company cannot affect or modify the strict terms of a policy thereafter issued. (*Fowler v. Metropolitan Life Ins. Co.*, 116 N. Y., 389; *Ruse v. Mutual Benefit Life Ins. Co.*, 23 N. Y., 516; *Mutual Benefit Life Ins. Co. v. Ruse*, 8 Ga., 534; *Smith v. National Life Ins. Co.*, 103 Pa. St., 184; *Knickerbocker Life Ins. Co. v. Heidel*, 8 Lea [Tenn.], 488; *Clark v. Allen*, 132 Pa. St., 40; *Connaway v. Wright*, 5 Del. Ch.,

472; *James v. Clough*, 25 Mo. App., 147, *Dodge v. Kiene*, 28 Neb., 216.)

Sedgwick & Power, contra.

IRVINE, C.

The plaintiff in error opens its brief by stating that this cause comes into this court both on appeal and by petition in error. This is impossible. It has been several times held that in cases which are in their nature appealable a party must elect which remedy to pursue, and will not be permitted to bring up for review the same judgment by both methods. A petition in error having been filed in this case, and there having been an appearance by the defendant in error, the case will be treated as before us on error and not on appeal. The assignments of error, however, cover all the questions argued, so that the difference in procedure does not affect the result.

Frank sued the insurance company, alleging that on January 8, 1891, he had paid the company \$4.50 as the premium for a policy of accident insurance, in consideration whereof the defendant executed and delivered to him a ticket of accident insurance in the sum of \$3,000. The policy, or so-called ticket, is then set out at large in the petition. The terms of this policy are for the most part immaterial to a consideration of the case. It purported to insure the person to whom issued for a period of thirty days against death or disability caused by external, violent, and accidental means, providing for the payment of \$3,000 in case of death and a certain sum per week during disability caused by accident. The plaintiff then alleged that it was agreed between the parties at the time the contract was made that in case of loss of one foot by such accident he should be paid one-third of the amount of the insurance named in the policy, to-wit, the sum of \$1,000, but by mistake the provision for such payment was omitted

from the ticket; that by agreement the ticket had been left with the agent of the company after its issuance, and plaintiff did not see or read it and supposed it contained this provision in accordance with the terms of the actual contract; that while the policy was in force plaintiff received an injury by being accidentally shot, necessitating the amputation of one foot. He then pleaded compliance with all the terms of the policy and prayed that the policy be reformed by inserting a clause in accordance with the oral agreement providing that in case of the loss of one foot he should be paid one-third of the amount of the policy, and then prayed judgment for \$1,000. The insurance company admitted issuing the policy, and admitted the injury sustained by plaintiff, and denied all other allegations in the petition. For a second defense defendant pleaded a failure to give proper proofs of loss. The company is not now claiming anything by reason of this defense. For a third defense the company alleged that before the issuing of this policy the plaintiff had lost his right hand and a portion of his right arm; that the company did not insure any persons who were crippled or maimed so as to provide for the payment to them in case of loss of a foot of one-third of the amount of the policy; and that no agent of the defendant had any authority to issue a policy so providing to any one so crippled or maimed, or to make any contract so insuring any one. The plaintiff in reply admitted that he had, prior to the issuing of the policy, lost his right hand and a portion of his right arm, and averred that at the time the policy was issued the defendant furnished its agents with circulars and advertising matter representing that the defendant wrote policies of insurance as stated in the petition, without mentioning any such restrictions as pleaded in the third defense of the answer, and that such circulars and advertising matter had been furnished to plaintiff as a basis of, and inducement to enter into, the contract of insurance, and that defendant

thereby led the plaintiff to believe that its agents were authorized to make such contracts. There was a finding and judgment for the plaintiff for \$1,000.

The argument by the insurance company is not directed to any special assignments of error, but is based on the ground that the evidence did not warrant the court in reforming the policy as prayed. We agree with counsel that in order to authorize a court of equity to reform an instrument purporting to constitute a contract it must be shown by satisfactory evidence that because of mutual mistake the instrument fails to express the contract which was in fact made, but we think the evidence was of such a character as to bring this case within the rule stated, and justified the finding and judgment of the trial court. The evidence shows that the plaintiff was the editor of a newspaper; that he habitually carried a large amount of accident insurance; that the defendant company inserted its advertisements in his paper, and the cost of this advertising was applied to the payment of premiums for insurance issued to him. Some months before this policy was issued he had applied for a policy of accident insurance in the defendant company, and his application was referred to the principal office for action on account of his having lost a hand and a portion of an arm. The policy was finally issued him, and provided among other things that if injuries of the character insured against should, within ninety days, result in the loss of one entire foot, one-third of the principal sum should be paid. This policy was canceled, the agent stating as the reason therefor that for the premium paid on such a policy the company was not willing to carry it when the insured already had so much other insurance. The agent then stated that while this was true the plaintiff could buy accident tickets which would insure him in the same manner as the policy, the agent giving the plaintiff at the same time a circular to the same effect. The premium on a ticket was \$4.50 for thirty days, while on the regular

policy it was \$25 per year. A ticket was therefore issued to plaintiff but left in the possession of the agent. When this ticket expired another was issued and left in the same manner. These tickets seem to have been left with the agent because of the manner in which accounts were carried between the agent and the plaintiff, the agent retaining the tickets in his possession and charging the premiums against the plaintiff's bills for advertising whenever settlements were had. This procedure went on for some months until plaintiff met with the accident described in the petition, during the currency of one of the tickets. In endeavoring to collect upon this ticket he learned for the first time that it contained no provision for the payment of one-third of the principal sum in case of the loss of a foot. The agent testifies that he supposed throughout the whole proceeding that the tickets did contain such a provision. The evidence shows that both the agent and the plaintiff had a distinct understanding to the effect that the contract was of this character, and if the agent was authorized to make such contract then the case was clearly one of a mutual misunderstanding calling for a reformation by a court of equity. The company proved quite conclusively that agents had no actual authority to issue policies having the provision contended for (which seems to be termed an "eye and limb clause") to persons already crippled or maimed. It was also shown that the company customarily did not issue policies under such conditions. But the question here is not what was the company's custom, or even what was the agent's actual authority, but what did the company do in this case, and what did it hold its agent out as authorized to do? It appears that when the plaintiff's regular policy was canceled, the agent informed plaintiff that he could obtain a ticket of insurance containing the same terms as the circular, which it is proved was issued for distribution by authority of the company, advertising these tickets, and calling special attention to this "eye and limb clause," without

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stating that there were any restrictions upon the issuing of such tickets. The defendant contends that this circular was not admissible in evidence, being in the nature of preliminary negotiations not embodied in the final contract. But the effect of the circular in this case is not to engraft foreign provisions upon the policy. It was admissible in evidence, accompanied as it was by proof that it was issued by authority of the company, for the purpose of showing that the company held out its agents as authorized to write policies such as both the agent and the insured thought had been written in this case. Having held out its agent as authorized to write such a policy, the company is now estopped from denying his authority. The judgment of the district court is right and is

AFFIRMED.

WESTERN UNION TELEGRAPH COMPANY V. CALL PUBLISHING COMPANY.

FILED MARCH 8, 1895. No. 5603.

1. **A telegraph company is a public carrier of intelligence, with rights and duties analogous to those of a public carrier of goods or passengers.**
2. **Telegraph Companies: REGULATION.** Section 7, article 11, of our constitution limits the legislature in the regulation of telegraph companies to the correction of abuses and prevention of unjust discrimination.
3. **———: RATES: DISCRIMINATION.** Not all discrimination in rates is unjust. In order to constitute an unjust discrimination there must be a difference in rates under substantially similar conditions as to service.
4. **———: ———: ———: WHEN PROHIBITED.** Chapter 89a, Compiled Statutes, regulating telegraph companies, prohibits, first, all partiality or discrimination between patrons in the handling of business; second, all partiality or discrimination in rates for

similar services ; third, partiality or discrimination as to terms of payment or delivery ; and fourth, all discrimination in favor of persons transmitting dispatches to the greater distance.

4. ———: ———: ———. In so far as the act referred to forbids unjust discrimination, and disregarding the penalties imposed by the act, it merely declares principles recognized by the common law.

5. ———: ———: ———: WHAT CONSTITUTES. Either under the common law or the statute a telegraph company must charge for its services no more than a reasonable rate; under like conditions it must render its services to all patrons on equal terms ; and it must not so discriminate in its rates to different patrons as to give one an undue preference over another.

7. ———: ———: ———: ———. It is not an undue preference to make to one patron a less rate than to another, where there exist differences in conditions affecting the expense or difficulty of performing the service, which fairly justify a difference in rates.

8. ———: ———: ———: ———: VERDICT AGAINST EVIDENCE. Where it is shown that a difference in rates exists, but that there is also a substantial difference in conditions affecting the difficulty or expense of performing the service, no cause of action arises without evidence to show that the difference in rates is disproportionate to the difference in conditions. A jury cannot be permitted to find such disproportion without evidence.

ERROR from the district court of Lancaster county.
Tried below before TIBBETS, J.

H. D. Estabrook and Harwood, Ames & Pettis, for plaintiff in error, cited: *Interstate Commerce Commission v. Baltimore & O. R. Co.*, 43 Fed. Rep., 37; *Bayles v. Kansas P. R. Co.*, 40 Am. & Eng. R. Cases [Col.], 42; *McNees v. Missouri P. R. Co.*, 22 Mo. App., 224; *Hays v. Pennsylvania R. Co.*, 12 Fed. Rep., 309; *Schofield v. Lake Shore & M. S. R. Co.*, 43 O. St., 571; *Lotspeich v. Central R. & B. Co.*, 73 Ala., 306; *Cleveland, C., C. & I. R. Co. v. Closser*, 45 Am. & Eng. R. Cases [Ind.], 275; *Johnson v. Pensacola & P. R. Co.*, 16 Fla., 623; *Leloup v. Port of Mobile*, 127 U. S., 640; *Wabash, St. L. & P. R. Co. v. Illinois*, 118

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U. S., 557; *Western Union Telegraph Co. v. Pendleton*, 122 U. S., 349.

William Leese and John M. Stewart, contra, cited, contending the service performed for the two papers was similar: (*Manufacturers' & Jobbers' Union of Mankato v. Minneapolis & St. L. R. Co.*, 4 Int. Com. Rep., 79; *Boards of Trade v. Chicago, M. & St. P. R. Co.*, 1 Int. Com. Rep., 215; *Louisville & E. St. L. C. R. Co. v. Wilson*, 32 N. E. Rep. [Ind.], 311. As to the measure of damages: *In re Excessive Freight Rates on Food Products*, 4 Int. Com. Rep., 74; note to *Long Island R. Co. v. Root*, 11 Am. St. Rep., 647-655; *Chicago & A. R. Co. v. People*, 67 Ill., 11; *Indianapolis, P. & C. R. Co. v. Rinard*, 46 Ind., 293; *McDuffee v. Portland & R. R. Co.*, 52 N. H., 430; *Cook v. Chicago, R. I. & P. R. Co.*, 81 Ia., 551; *Hays v. Pennsylvania R. Co.*, 12 Fed. Rep., 309; *Louisville & E. St. L. C. R. Co. v. Wilson*, 32 N. E. Rep. [Ind.], 311; *Burlington, C. R. & N. R. Co. v. Northwestern Fuel Co.*, 31 Fed. Rep., 652; *Samuels v. Louisville & N. R. Co.*, 31 Fed. Rep., 57; *Scofield v. Lake Shore & M. S. R. Co.*, 43 O. St., 571; *State v. Cincinnati, N. O. & T. P. R. Co.*, 47 O. St., 130; *Connell v. Western Union Telegraph Co.*, 18 S. W. Rep. [Mo.], 883.

IRVINE, C.

The Call Publishing Company is a corporation publishing a daily newspaper in the city of Lincoln. It brought this suit against the Western Union Telegraph Company, alleging that since July 1, 1888, it had been receiving from the telegraph company the dispatches of the Associated Press collected by that organization at Chicago and transmitted daily from Chicago to Lincoln as well as to other cities; that there existed between the Associated Press and the telegraph company a contract which prevented the Call Company from procuring its news otherwise than over the

lines of the telegraph company; that during said period the telegraph company had charged and collected from the Call Company \$75 per month for transmitting such dispatches, not exceeding 1,500 words each day; that the State Journal Company published in the city of Lincoln a daily newspaper which had been during the whole of such period and prior thereto receiving the same dispatches; that during the whole of said period the telegraph company unjustly discriminated in favor of the State Journal Company and against the Call Company, and gave to the State Journal Company an undue advantage, in that it charged the State Journal Company for the same, like, and contemporaneous services as were rendered to the Call Company only the sum of \$1.50 per hundred words daily per month; that the amount charged and collected by the telegraph company from the Call Company was excessive and unjust to the amount of the excess of the charge to it over that to the State Journal Company; that immediately upon discovering such discrimination, the Call Company demanded repayment of such excess, which was refused. Damages were alleged on this account in the sum of \$1,962, for which judgment was prayed. The telegraph company admitted the charges made to the Call Company and admitted that it charged the State Journal Company for its dispatches \$125 per month, but denied that it had given the State Journal Company any undue advantage or that it had unjustly discriminated in favor of the State Journal Company. It further alleged that the Call Company published an evening paper, and received over the telegraph company's lines dispatches not exceeding 1,500 words per day, all transmitted and delivered in the day-time, and that this charge was fair and reasonable and was no greater than was charged other persons for similar services. It further alleged that it had accepted the provisions of the act of congress of 1866, in regard to telegraph companies, and pleaded that the subject-matter of the

action was within the exclusive jurisdiction of the federal courts; and it further pleaded that it at all times had been ready to transmit all dispatches with impartiality in the order in which they were received, and had ever been willing to offer the same and equal facilities to the plaintiff and all publishers of newspapers, and to furnish dispatches for publication to all newspapers on the same conditions as to payment and delivery. The reply was a general denial. There was a verdict for the plaintiff for \$975, upon which judgment was rendered, and the telegraph company prosecutes error.

The errors assigned relate to the instructions given and refused, and to the sufficiency of the evidence. The assignments of error in regard to the instructions group themselves in the same manner as in the case of *Hiatt v. Kinkaid*, 40 Neb., 178. One assignment is directed against the instructions given by the court *en masse*. Another is directed against those asked by the telegraph company and refused. Some of those given by the court were manifestly correct, and at least one asked by the telegraph company was substantially covered by the court's charge. These assignments must, therefore, be overruled, and we are remitted in an examination of the case to a consideration of the sufficiency of the evidence.

The evidence shows, without substantial conflict, that prior to July, 1888, a newspaper had been published in the city of Lincoln known as the *State Democrat*. This paper had acquired what is styled a "franchise" in the Northwestern Associated Press, and had been receiving the dispatches of that organization, paying to the Associated Press \$20 per month therefor, and paying to the telegraph company for transmitting and delivering the dispatches \$75 per month for a maximum of 1,400 words per day. The manner in which this contract was brought about was that Mr. Calhoun, the proprietor of the *State Democrat*, negotiated with the manager of the press association for procuring its

news, and was by that manager informed that he should first make terms with the telegraph company for transmitting the messages. Negotiations were entered into between Mr. Calhoun and the telegraph company, resulting in an offer by the telegraph company to transmit 1,400 words per day for \$75 per month, and this offer was accepted by Mr. Calhoun. About July 1, 1888, Mr. Calhoun sold his paper to the Call Company and assigned to that company the franchise which he had acquired in the Northwestern Associated Press. No new contract is disclosed between the Call Company and telegraph company, but the telegraph company continued to deliver and the *Call* to receive the dispatches in the same manner as they had been transmitted and received to and by the *Democrat* before the sale, and the Call Company paid the rate of \$75 per month. The paper published by the Call Company was an evening paper published between 3 and 4 o'clock in the afternoon.

The State Journal Company published a morning paper. It was also a member of the Associated Press and received over the wires of the telegraph company dispatches not to exceed 5,600 words a day, for which it paid, during this period, the sum of \$125 per month. It also was a member of the United Press, another association for the collection of news, and received through that association over the wires of the Postal Telegraph Company from 7,500 to 8,000 words per day, for which it paid to the Postal Company \$200.

The Associated Press transmits its news in two groups, called "reports." The day report is transmitted between 11 A. M. and about 2:30 P. M., and is for the especial benefit of evening papers. It is this report which the Call Company received. The night report is usually transmitted at night and generally between 7 P. M. and 3 A. M., and is for the especial benefit of morning papers. The Journal Company's contract strictly included only the night report, but for many years it has in fact received

both day and night reports. Prior to the acquisition by the *Democrat* of its franchise in the Associated Press the day report to the *Journal* was relayed at Omaha, whence it was usually transmitted to Lincoln by wire, but sometimes by mail. The *Journal* Company sent to the office of the telegraph company for this report, and usually obtained it about 4 P. M. After the *Democrat's* acquisition of the franchise the day report was transmitted from Chicago directly, except when the weather or other influences required a relay at Omaha. It was sent in time for use by the afternoon paper, was committed to writing on manifold paper, one copy delivered to the *Democrat*, and after its sale, to the *Call*, and the other to the *Journal*. The *Journal* was not permitted to use this report until after it had been published in the *Call*. It was also shown that in order to be of any service to the *Call* the day report must be delivered to it not later than 3 o'clock in the afternoon, while the night report to the *Journal* might be transmitted at any time prior to about 3 o'clock in the morning. Prior to the contract between the *Democrat* and the telegraph company for the day report, the telegraph company used but one wire between Omaha and Lincoln. In order to promptly transmit the day report to the *Democrat* the telegraph company was required to erect another wire and to employ an additional operator at Lincoln. Neither this wire nor this operator was employed exclusively for transmitting the report. Other business between the two cities demanded additional facilities, and this wire and this operator, when not engaged in transmitting the press report, were used for commercial business. But the necessity of transmitting this report was one of the elements, and evidently a large one, in requiring the telegraph company to so increase its facilities. During the hours within which the day report must be transmitted the facilities of the telegraph company are taxed with a great burden of commercial business, and during those hours certain wires are leased to individuals

to accommodate their business. After 4 o'clock in the afternoon these leased wires are free and can be used by the telegraph company for other purposes. During the night when the night report is transmitted not only are these leased wires free for use by the telegraph company, but there is not the same pressure of commercial business generally, and it is the established usage of telegraph companies, on account of these circumstances, to transmit messages during the night at less rates than in the day-time. There is also evidence tending to show that there were more morning papers to divide the aggregate cost of transmitting the night report than there were evening papers to divide the aggregate cost of transmitting the day report.

There was some question made as to whether or not the *Call* and the *Journal* were in any sense competitors in such a way that either could be affected by the relative rates charged. On this point we have no doubt that a state of competition was shown. One was a morning paper, the other an evening paper, and the same persons frequently buy or subscribe to both; but it was shown that the advertising rates of a newspaper depend chiefly upon its circulation, and that its circulation depends largely upon its ability to supply the news to its patrons. That a paper with good facilities for obtaining and publishing the news will, other things being equal, exceed in circulation a paper with poorer facilities; and that these influences operate upon newspapers having the same field of circulation, although one be published in the morning and the other in the evening. Indeed it would hardly require evidence to establish such patent facts.

From the foregoing statement of the evidence it will be seen that the following propositions were established: First—That the actual rate charged to the *Call* was much greater than the actual rate charged to the *Journal*. Second—That the two papers were in such sense competitors, that if one, for a given sum, could not obtain the same news

facilities as the other for the same sum, the difference would operate to the disadvantage of the former. Third—That from the requirements of the two papers, based upon their respective hours of publication, there was a marked and substantial difference in conditions affecting the convenience and expense to the telegraph company in transmitting to each its dispatches. Fourth—That there was no evidence of any character showing to what extent this difference in conditions affected the telegraph company. There was no evidence tending to show that the charge to the Call Company was in itself unreasonably high, that the charge to the Journal Company was unreasonably low, or that the charge to either was greater or less than the ordinary or reasonable charge to others for similar services. It follows, therefore, that the verdict was sustained by the evidence if, as a matter of law, it was sufficient to show either that another person was obtaining dispatches for a less sum than the plaintiff without regard to differences in conditions, or if it was sufficient to show a difference in rate accompanied by a difference in conditions, leaving to the jury, without other evidence, the duty of comparing the difference in rates with the difference in conditions and determining without other aid whether or not the difference in rates was disproportionate to the difference in conditions. But the verdict was not sustained by the evidence if a mere difference in rates without regard to conditions was insufficient to ground a right of action, or, a difference both in rates and conditions being shown, it was also necessary to establish by evidence that these differences were disproportionate.

The action was evidently begun under section 8 of chapter 89a, Compiled Statutes, providing that "it shall be unlawful for any telegraph company, association, or organization engaged in the business of forwarding dispatches by telegraph to demand, collect, or receive from any publisher or proprietor of a newspaper any greater sum for a given service than it demands, charges, or collects from the publisher or

proprietor of any other newspaper for a like service, * * and * * * such telegraph company or association shall be liable for all damages sustained by the person or parties in consequence of such discrimination." Our constitution contains an express grant of authority to legislate upon this subject. Article 11, section 7, of the constitution is as follows: "The legislature shall pass laws to correct abuses and prevent unjust discrimination and extortion in all charges of express, telegraph, and railroad companies in this state, and enforce such laws by adequate penalties to the extent, if necessary for that purpose, of forfeiture of their property and franchises." In the absence of such a provision in a state constitution there could be little doubt of the power of the legislature in the premises. But *expressio unius est exclusio alterius*, and the constitution containing this express grant of power the provision quoted must be taken as establishing the limits of legislative authority upon this subject. We refer to the constitutional provision because it simply grants the right to prevent by legislation "unjust discrimination." This phrase has been frequently used by the courts and legislatures and has obtained a well settled construction. It is not every discrimination which is unjust. So many cases illustrate this principle that it would be difficult to collate them. But the general nature of the decisions may be readily seen from an examination of the note to *Root v. Long Island R. Co.*, 11 Am. St. Rep. [N.Y.], 643. In construing our statute it is necessary to bear in mind the constitutional limitation quoted, and the statute bears a just and reasonable construction within that limitation. It provides in its fifth section that all telegraph companies shall transmit all dispatches with impartiality in the order in which they are received, and use due diligence in their delivery without discrimination as to any person or party to whom they may be directed. This section evidently refers to the duty of the telegraph company as to the mode of conducting its business and not to the charges

therefor, and forbids partiality or discrimination in the transmission of messages. Section 7 is very similar in its terms to what is known "as the long and short haul clause" of the interstate commerce act, and forbids the charging of a greater sum for the transmission of a message over a given distance than it charges for a similar message over a greater distance, but adds this significant proviso: "That dispatches transmitted during the night and dispatches for publication in newspapers may be forwarded and delivered at reduced rates; such rates must, however, be uniform to all patrons for the same service." Section 8 we have already quoted so far as it is material. Section 9 provides: "Every telegraph company and every press association engaged in the transmission, collection, distribution, or publication of dispatches shall afford the same and equal facilities to all publishers of newspapers, and furnish the dispatches, collected by them for publication in any given locality, to all newspapers there published, on the same conditions as to payment and delivery."

An analysis of these provisions discloses that the legislature sought, by the act referred to, to prohibit, first, all partiality or discrimination between patrons in the handling of business; second, all partiality or discrimination in regard to rates for similar services; third, all such partiality or discrimination as to terms of payment or delivery; and fourth, all discrimination in favor of persons transmitting dispatches to the greater distance. Without violence to the language of the act, and without giving it an interpretation beyond the constitutional grant of power, it cannot be construed so as to require a telegraph company to transmit messages to two patrons under different conditions at the same rate. So interpreted we do not think that the act, in so far as it affects civil actions, and disregarding the penalties it imposes, is anything more than declaratory of the common law. In the present state of civilization it would be idle to assert that a telegraph company is not charged

with a public function. The telegraph company in this case does not so assert. It is now the established law that a telegraph company is a public carrier of intelligence, with rights and duties analogous to those of a public carrier of goods or passengers. The law regulating the duties of railroads and other carriers is, therefore, largely applicable to telegraph companies. The act of congress known as the "Interstate Commerce Act" contains few new features and was chiefly designed to carry into the statutes of the United States (the United States as such not having any common law) the principles of the common law already enforced by the states in their domestic affairs. England and many of the states have adopted similar statutes, not so much to engraft new principles upon the law as to make certain and more readily enforce principles already established.

It is argued by the telegraph company that no cause of action can be predicated upon the mere fact that another patron obtained services for a lesser rate, unless it be shown that the rate charged the complainant is in itself unreasonable and excessive. There are cases to this effect, but we cannot lend our assent either to their reasoning or to their conclusion. On the contrary, we believe the true rule to be that rates must not only be reasonable in themselves, but must be relatively reasonable; that is, that a person or corporation engaged in public business, and obligated to render its services to all persons having occasion to avail themselves thereof, is bound, in fixing its rates, to observe two rules: First, its rates must be reasonable, and second, it must not, without a just and reasonable ground for discrimination, render to one patron services at a less rate than it renders to another, where such discrimination operates to the disadvantage of that other. (*Board of Trade v. Chicago, M. & St. P. R. Co.*, 1 Int. Com. Rep., 215; *Hays v. Pennsylvania R. Co.*, 12 Fed. Rep., 309; *Scofield v. Lake Shore & M. S. R. Co.*, 43 O. St., 571; *Chicago & A. R.*

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Co. v. People, 67 Ill., 11; *Indianapolis, D. & S. R. Co. v. Ervin*, 118 Ill., 250; *Messenger v. Pennsylvania R. Co.*, 36 N. J. Law, 407; *Atwater v. Delaware, L. & W. R. Co.*, 48 N. J. Law, 55; *McDuffee v. Portland & R. R. Co.*, 52 N. H., 430; *Houston & T. C. R. Co. v. Rust*, 58 Tex., 98; *Ragan v. Aiken*, 9 Lea [Tenn.], 609.) But it is not unjust discrimination, it is not contrary to the common law, and it is not contrary to our statutes to make a difference in rates where the expense or difficulty of performing the services renders such discrimination fair and reasonable. Many of the cases already cited illustrate this principle. In addition thereto there may be cited *Interstate Commerce Commission v. Baltimore & O. R. Co.*, 43 Fed. Rep., 37; *Bayles v. Kansas P. R. Co.*, 13 Col., 181; *Root v. Long Island R. Co.*, *supra*; *Savitz v. Ohio & M. R. Co.*, 49 Ill. App., 315, 37 N. E. Rep., 235. With the general rule announced in the latter cases we concur, but we do not wish to commit ourselves to its application in all of them. Some cases justify a discrimination merely on account of the quantity of business transacted. In the language of *Hays v. Pennsylvania R. Co.* and *Scofield v. Lake Shore & M. S. R. Co.*, *supra*, such discrimination in favor of the patron having the larger business tends to create monopoly, destroy competition, and is contrary to public policy. The same objection can be urged to the giving of privileged rates for the purpose of obtaining the business of a particular patron, and a discrimination on this ground is, we think, very justly condemned by the house of lords in the case of *London & N. W. R. Co. v. Evershed*, L. R., 3 App. Cases [Eng.], 1029. Many of the cases cited construe statutes, but they were statutes declaring what we think to be common law rules, so that whether this case be viewed as one under our statutes relating to telegraph companies, or one based upon the common law, we think the principles governing it are the same. These are that the telegraph company was bound, first, to charge for services no

more than what was reasonable; second, that under like conditions it must render services to all patrons on equal terms; third, that it must not so discriminate in its rates to different patrons as to give one an undue preference over another; but fourth, it is not an undue preference to make to one patron a less rate than to another when there exist differences in conditions as to the expense or difficulty of the services rendered which fairly justify such a difference in rates.

As we have already stated, a considerable difference in the absolute rate charged the Call Company and the Journal Company was shown, but there were also shown a difference in conditions affecting the expense and difficulty of rendering the services which at common law would justify some difference in rates, and this difference was one which the proviso quoted from the seventh section of our statute expressly recognizes as justifying a discrimination in this state. There was no evidence to show that the rate charged the Call Company was unreasonably high. There was no evidence to show that the rate charged the Journal Company was unreasonably low. There was no evidence to show what difference in rates was demanded or justified by the exigencies of the differences in conditions of service. We do not think that the enforcement of contracts deliberately entered into should be put to the hazard of a mere conjecture by a jury without evidence upon which to base its verdict. How can it be said that a jury acts upon the evidence and reaches a verdict solely upon consideration thereof when, having established a difference in rates and a difference in conditions, without anything to show how one difference affects the other, or to what extent, it is permitted to measure one against the other, and to say that to the extent of one dollar or to the extent of one thousand dollars the difference in rates was disproportionate to the difference in conditions? It may be said that it would be difficult to produce evidence to show to what extent such

differences in conditions reasonably affect rates. This may be true, but the answer is that whatever may be the difficulties of the proof a verdict must be based upon the proof and a verdict must be founded upon evidence and not upon the conjecture of the jury, or its general judgment as to what is fair without evidence whereon to found such judgment.

The chief justice takes a different view, and thinks there is found in the evidence a basis for the verdict. This conclusion is arrived at by considering the service performed for the *Journal* so far as the day report is concerned as similar in its conditions to that performed for the *Call*. We agree with him that it is the fair inference from the evidence of the witness Hathaway that the sum of \$125 per month paid by the *Journal* is intended to include compensation for both day and night reports, but we do not think that any basis of comparison is thus afforded. The chief justice argues that because the day report is now taken from the wires on manifold paper and one copy given to the *Call* and the other to the *Journal*, the conditions of service as to this report are the same. In this we think there is overlooked the fact that it is only on account of the *Call's* contract that the telegraph company is required to deliver the report to either paper at the time or in the manner in which it is now delivered. At the risk of some repetition we shall point out what are conceived to be the differences in the conditions affecting the two papers. Before the *Call*, or rather its predecessor, the *Democrat*, began to take the report, the day report was delivered to the *Journal* at the convenience of the telegraph company. The *Journal* had no contract requiring the delivery of this report at any particular time. This is shown by the testimony both of Mr. Calhoun and Mr. Horton. The *Journal* makes use of this day report only to assist it in editing the night report, and did not then have, nor has it now, any use for the day report until evening. Indeed, now that

there is an evening paper in Lincoln, for the purposes of the *Journal* it might wait until the *Call* appeared and use the dispatches published in that paper, without depending upon the telegraph company at all. Under the former conditions, therefore, commercial business was given the right of way on the wires and the day report was transmitted during lulls in the commercial business, without any requirement that it should go to Lincoln before evening. In taking advantage of this right to give commercial business the preference there was then a delay of several hours at Omaha. According to the testimony on behalf of both parties the day report is of no use to the *Call* unless it is all received by 3 o'clock, or within a few minutes thereafter, and this report now has the right of way during the hours of its transmission as against commercial business. In order to accommodate this business the telegraph company was compelled to increase its facilities between Omaha and Lincoln. The evidence is undisputed upon this. Mr. Horton says in answer to a question as to what the telegraph company did to enable it to transmit the day report:

I put up an additional wire between Omaha and Lincoln over the Missouri Pacific railway. We had to employ an additional operator at Lincoln to take the afternoon report. A portion of his time, of course, was utilized in other business.

Q. What portion of the time was devoted to this exclusively?

A. From 11 o'clock to 3:30.

Q. How much was his salary per month?

A. Sixty dollars.

On cross-examination the same witness was asked whether it was not the growth of commercial business that made it necessary to put in a new wire for this report. His answer was, "That was partly it, certainly. We would not have built a wire on purpose to accommodate one newspaper at \$75 a month." From this we think it ap-

pears not that the wire was erected chiefly on account of the commercial business, but that it was the necessity of supplying the day report to the *Call* which was the immediate cause of erecting the wire. Under the old conditions the *Journal* paid the same rate which it does now for its report. Those conditions were then, and are now, sufficient for the purposes of the *Journal*. The fact that it now gets the day report on manifold paper as early as the *Call* is a matter of no consequence to the *Journal*, as it is not allowed to use the report until after the *Call* is published. Both Mr. Cox and Mr. Calhoun testify to this. To hold that the conditions are now similar and that the *Journal* and *Call* must have the same rate would require either that the telegraph company make its rate for the increased service as low as it was for the former service, or else that it increase the rate charged the *Journal*, although the *Journal* is in nowise interested in the increase of service. We think, therefore, that the conditions of service which the *Call* requires and which the *Journal* requires are so different as to leave no basis for comparison.

REVERSED AND REMANDED.

NORVAL, C. J., dissenting.

I do not concur in the conclusion reached by Commissioner IRVINE, that there is no evidence in the bill of exceptions to sustain the verdict and judgment. The record shows without controversy that for nearly three years prior to the bringing of this action the Call Company paid the telegraph company the sum of \$75 per month for transmitting in the day-time the dispatches or reports of the Associated Press containing not exceeding 1,500 words each day, and during this period manifold copies of the dispatches were likewise delivered by the telegraph company to the State Journal Company, and the last named company also, in addition to said day reports, received each

night from the Associated Press over the wires of the telegraph company dispatches not exceeding 6,500 words; that the State Journal Company paid for transmitting the dispatches received by it during said time the sum of \$125 per month, and no more. Whether the last named sum was paid for both the day and night reports or messages, or for night reports alone, the evidence is conflicting.

Mr. C. B. Horton, the assistant superintendent of the telegraph company, in his testimony says no compensation was received for transmitting the day messages, but the sum of \$125 was paid for the night dispatches alone; that no charge was made for the day reports, but the same were furnished the State Journal Company without compensation, as a mere gratuity.

Mr. J. D. Calhoun testified that the State Journal Company paid \$125 for the transmission of both the day and night reports received by it.

Mr. H. D. Hathaway, the manager of the State Journal Company, being interrogated while upon the witness stand whether anything was paid for the day reports, answered: "No, sir; except as we paid—it might be included in the whole arrangement."

The fair inference to be drawn from the testimony of the last named witness is that no specified amount was collected for the day reports alone, but that the sum collected—\$125 per month—was for both reports. The record discloses that the usual rate charged for night reports or messages is four times less than that paid for sending the day reports of the same number of words. This being true, it is not reasonable to suppose that the State Journal Company would pay \$125 per month for the night dispatches merely, when the Call Company was paying \$75 per month for the day reports received by it. According to the customary difference between the day and night rates, the State Journal Company, if we adopt as a basis the sum the Call Company was charged for its dispatches, should

have paid but \$75 per month, had the night reports contained 6,000 words each, instead of paying \$125 per month for the transmission of dispatches of 5,600 words each, as is claimed by the telegraph company. In my view the plaintiff was entitled to a verdict for some amount whether the State Journal Company paid \$125 for both the day and night dispatches or for the night reports alone. If, as contended by the telegraph company, nothing was charged the State Journal Company for the day reports, and the evidence before the jury was sufficient to authorize them in so finding, then it is patent that the plaintiff in error did not render the services to the Call Company on the same terms it did to another patron, but unjustly and unlawfully discriminated in its rates against the defendant in error. The evidence shows that the State Journal Company had been receiving the day reports of the Associated Press for a long time prior to the date the Call Company commenced taking them, and no additional trouble, costs, and expense were incurred by the telegraph company in furnishing the reports to the defendant in error, inasmuch as the day reports were taken off the wires on manifold paper and one copy thereof was delivered to the State Journal Company and the other copy to the defendant in error. It is true that after the Call Company began taking the dispatches the plaintiff in error put up another wire between Lincoln and Omaha, but the evidence shows that this was done chiefly to provide additional facilities for taking care of the rapid increase of its commercial business. Prior to the time the *Democrat*, the predecessor of the *Call*, commenced taking the dispatches the day reports were usually delivered to the Journal Company about 4 o'clock in the afternoon, which was no later than they are now received. These reports were sometimes forwarded to the Journal Company by mail, but the common practice, as well as the most convenient mode for the telegraph company, was to send them over the wire. Now there is no relay at

Omaha, but the day reports are received at Lincoln at the same time as in Omaha, but, so far as the proofs show, the trouble and expense to the telegraph company was not increased by the change but lessened. That formerly it was under no contract to deliver the day reports at a particular hour is unimportant, inasmuch as the fact remains that there has been no substantial change in the time of delivery since the contract with the publishers of the *Democrat* was made. Nor is it material that the *Call* is an evening paper and the *Journal* is published in the morning, and that the latter has no use for the day report until late in the afternoon or night. There is a total lack of evidence to show that these facts, or any of them, in the least affected the expense or difficulty of performing the service.

It also appears by the testimony of Mr. Cox, one of the proprietors of the *Call*, and Mr. Calhoun, formerly managing editor of the *Journal*, that the day dispatches appear regularly and in full in the last named paper. It is said, however, that the Journal Company, without any extra cost to it, might have taken the dispatches from the *Call* instead of depending upon the telegraph company. This could have been done only to the extent the *Call* uses them. Mr. Cox testifies, and it is undisputed, that the *Call* did not always contain the full report, or even half of it. Sometimes it is received too late for use in the evening paper. We have not overlooked the fact that the *Call* contract contains a clause to the effect that the telegraph company should not deliver the day report to any other paper in Lincoln until after the *Call* goes to press. This provision is of no validity. A telegraph company is a common carrier and must treat all persons alike. It cannot discriminate against its patrons, or give one paper a monopoly of the Associated Press dispatches. It could no more do that than a railroad company could contract with A to carry his stock from Lincoln to South Omaha and

provide therein that the stock of B, consigned to the same place and carried on the same train, shall not be delivered until A's stock has been delivered and sold. Again, the stipulation in the *Call* contract did not affect the Journal Company, for the reason that the latter had no use for the day report until in the evening. We are convinced that the services rendered the defendant in error and the State Journal Company, as to the day dispatches, were under like conditions as to costs and expense; therefore, upon the testimony of Mr. Horton alone, the plaintiff was entitled to recover. The rule is where a telegraph company charges one person a higher rate than it exacts from another for the transmission of dispatches under like conditions, the difference between the charges is the measure of damages the one who has been discriminated against is entitled to recover. (*Cook v. Chicago, R. I. & P. R. Co.*, 81 Ia., 551; *Scofield v. Lake Shore & M. S. R. Co.*, 43 O. St., 571; *Louisville & E. St. L. C. R. Co. v. Wilson*, 32 N. E. Rep. [Ind.], 311; *Hays v. Pennsylvania R. Co.*, 12 Fed. Rep., 309; *Samuels v. Louisville & N. R. Co.*, 31 Fed. Rep., 57.) The plaintiff below was entitled to a verdict, even though the State Journal Company paid \$125 per month for both the day and night reports.

It will be observed that the Call Company was required to pay for the transmission of its dispatches at the rate of \$5 per month for each one hundred words, while the State Journal was charged for the messages received by it a little over \$1.76 per month per hundred words. There is no room for doubt that this difference in rates would constitute unjust discrimination against the Call Company, for which it would be entitled to recover the difference between the amount paid by it and the more favorable rates granted the State Journal Company were it not for the fact that all the messages to the two companies were not transmitted by the plaintiff in error under like conditions as to service. What were the differences in conditions which affected the

cost or expense of the transmission of the messages? The day reports, as we have already seen, were sent to each of the two patrons under practically similar conditions and at the same time. As to the day reports, as we have seen, there could be no difference in the costs or expense of the service. The night and day messages or reports were transmitted under conditions materially different. It was shown that such differences in conditions necessarily made the tolls charged for the night reports less than the rates received for the service rendered in transmitting the day messages of the same number of words. I do not agree with my associates that there was no evidence of any character showing to what extent the difference in conditions affected the telegraph company. On the contrary, I am fully persuaded that there is such evidence in the record and that it shows the difference in the rates charged was not proportionate to the difference in the conditions which affected the expense of performing the service.

Mr. C. B. Horton, the witness already mentioned, testified upon this branch of the case as follows:

Q. What, if any, difference is there in the case of operating or handling news at night and during the day—what difference in cost and in the convenience? State wherein it is.

A. In the day-time, as everybody knows, our wires are loaded with important business, board of trade grain messages, and we have wires leased during those hours and they are filled and occupied. At night we have idle wires and we utilize them. A lower rate has always been made in the night service. On press reports it is about one to four, one of day to four at night.

Q. One word at day to four at night?

A. Yes, sir; I believe that is the rule in all of our contracts.

Q. Whether it is by the word or by the job?

A. Yes, sir.

Palmer v. Vance.

The foregoing evidence was sufficient to authorize the jury in finding the difference in rates between the day and night reports. The Call Company should not have been charged more than four times the rates charged for the night messages. The difference between the rates paid and the tolls which should have been charged for service rendered the defendant in error was fully established by the evidence. It paid \$5 for each one hundred words daily per month, when the rate should have been not exceeding \$4. There was, therefore, an unjust discrimination of \$1 per hundred words per month, which amounted to \$15 per month. This sum was overpaid each month for thirty-four months, making an aggregate of \$510, to which should be added interest at seven per cent on each payment from the date thereof until the rendition of the judgment in the court below, amounting to \$83.30. So under this view of the case the Call Company was entitled to a verdict for at least the sum of \$593.30, while if as the telegraph company contends, and there is some evidence in the record tending to show that the Journal Company paid nothing for the day reports, the verdict is none too large. The judgment should be affirmed, or at least it should be allowed to stand upon the defendant in error entering a remittitur for the amount the verdict is in excess of \$593.30.

44	348
54	286

**JAMES S. PALMER V. ROBERT VANCE ET AL., COUNTY
COMMISSIONERS OF SALINE COUNTY.**

FILED APRIL 3, 1895. No. 6272.

Highways: LOCATION: DAMAGES: ROAD FUNDS. . The damages sustained by the land-owner by reason of the location of a public highway cannot be paid out of the county road fund, but must be paid out of moneys in the road fund of the road district in which the land taken for the highway is situated. *Ackerman v. Thummel*, 40 Neb., 95, followed.

OR from the district court of Saline county. Tried before HASTINGS, J.

er & Hendee, for plaintiff in error.

VAL, C. J.

blic road was located over lands belonging to the and his damages were allowed at \$50. An appeal en to the district court, where he recovered the sum and costs taxed at \$100.75. This action was brought the respondents, as the county commissioners of Salinity, to compel them to draw a warrant in favor elator on the county road fund for the amount of lgment and costs. A writ of *mandamus* was denied action dismissed.

gle question is presented for determination and that her the respondents should have paid the judgment roversy out of moneys in the county road fund. In an v. *Thummel*, 40 Neb., 95, this court had under ration the several statutory provisions relating to tion of highways and the payment of damages susy the land-owner by reason of the establishment of a road, and it was there held that all such damages e paid out of moneys in the road fund of the road in which the land taken for highway purposes is , and that the county is not liable for the payment damages. The rule there announced is decisive of at bar, and that too against the contention of re-

The respondents having no authority to draw a t on the county treasury in payment of the judg- he district court did not err in refusing the writ of nus. The judgment is

AFFIRMED.

Osgood v. Grant.

**RALPH R. OSGOOD, APPELLEE V. PATRICK J. GRANT
ET AL., APPELLANTS.**

FILED APRIL 3, 1895. No. 5848.

1. **Trial.** Under section 281a of the Code of Civil Procedure, an action in which the issues have been joined during term time may be placed upon the trial docket and tried at such term of court.
2. ———. Causes are to be tried in the district court in the order in which they are entered upon the trial docket, unless the court, in the exercise of a sound discretion, shall direct otherwise.
3. **Interest on Taxes: RATE.** On the foreclosure of a valid tax sale certificate the holder is entitled to recover interest on the amount bid at the sale and on the several sums paid for subsequent taxes on the property, at the rate of twenty per cent per annum, from the date of the sale and said payments respectively until the expiration of two years from the date of the purchase, and ten per cent interest thereon after that period.
4. **Attorney's Fees: COSTS: TAX SALES.** The holder of a tax lien, based upon a valid tax sale, on obtaining a decree foreclosing the same, is entitled to an attorney fee of ten per cent of the amount of the decree.

APPEAL from the district court of Lancaster county.
Heard below before FIELD, J.

Richard Cunningham, for appellants.

W. Q. Bell and *E. C. Rewick*, contra.

NORVAL, C. J.

This was an action brought by Ralph R. Osgood against Patrick J. Grant, Mary A. Grant, and others to foreclose certificates of tax sales upon lots 14 and 15, in block 69, in the city of Lincoln. Answers and cross-petitions were filed by several of the defendants, setting up liens against the premises by virtue of certain judgments and decrees of foreclosure entered in the district court of Lancaster county.

41	850
55	108
44	350
57	683
44	850
61	151
44	850
62	223m

At the close of the trial a decree of foreclosure and sale of the premises was rendered and the amount and priority of the several liens were established. The Grants have prosecuted an appeal to this court.

The first complaint made in the brief relates to the placing of the cause on the trial docket for the February, 1892, term of the district court and the trying of the same at said term. The action was commenced on January 23, 1892, and on February 25, 1892, the appellants, by leave of court, were permitted to file their answer out of time. The answers and cross-petitions of the other defendants were filed at various dates between February 23 and May 16, 1892. The February term of Lancaster county district court commenced on February 1 and continued until the following July. At the time the decree in question was entered, namely, June 16, and for at least thirty days prior thereto, the issues in the case had been made up. Section 281a of the Code of Civil Procedure provides: "Actions shall be triable at the first term of the court, after the issues therein, by the times fixed for pleading, are, or should have been, made up; and when, by the times fixed for pleading, the issues are, or should have been, made up during a term, such action shall be triable at that term. When the issues are, or should have been, made up, either before or during a term of court, but after the period for preparing the trial docket of such term, the clerk shall place such actions on the trial docket of that term." It requires no argument to show that authority is conferred upon the clerk of the district court, by the provisions of the foregoing section, to enter upon the trial calendar for the term causes in which the issues are, or should have been, joined during such term. Such is the plain language of the statute.

What is the meaning of the language "during a term," as used in the section under consideration? That it does not refer alone to the first day of the term is quite evident, but it applies as well to every succeeding day of the term.

Therefore, all cases, when the rule day for pleading expires on or after the convening of a term of court, and prior to the final adjournment thereof, in which the issues are, or should have been, made up during term time, may be placed upon the docket and disposed of at that term of court. In other words, it is not essential that the rule day should fall on the first day of a term of court in order that the cause may be docketed and tried at that term. Nor is it indispensable that the action should have been instituted during a term of court, but the section applies in all cases whenever brought when the term continues until after the expiration of the period for making up the issues. There was, therefore, no error in placing this action upon the trial docket of the term at which it was entered, and trying the cause at that term. By the section quoted where the issues in a cause have been made up during term time, the action is triable at such term. Under section 324 of the Code, causes in the district court are to be tried in the order in which they are entered upon the trial docket, unless the court in the exercise of a sound discretion shall otherwise direct, or the parties consent to a postponement of the trial. There is nothing in the record to show that the cause at bar was heard out of its regular order, nor does it appear that the appellants were prejudiced by the trial of the action at the February term. True, an application was made for a continuance of the cause over the term, but upon what ground the record fails to advise us. Appellants had ample time after the issues were formed to procure their witnesses, if any they had, and prepare for trial. If postponement of the hearing was desired on the account of the absence of witnesses, a proper showing to the court should have been made. The objection urged to the trial of the cause at the term during which the issues were joined is without merit and is overruled.

The trial court found that there was due the plaintiff upon first cause of action set forth in the petition, for

moneys paid by him for taxes levied against said lot 14 for the year 1883 and years subsequent thereto, with interest thereon, the sum of \$434.03; also an attorney's fee of \$43.03, and said sums were made liens upon said lot. The court further found that there was due the plaintiff upon his second cause of action for taxes paid by him upon lot 15 for the year 1883 and subsequent years, with interest and costs, the sum of \$654.57, and decreed the same to be a lien upon said lot, and also an attorney's fee of \$65.45, which was allowed the plaintiff by the court. The appellants insist that the several amounts found due the plaintiff are too large, and are contrary to the evidence. The contention is well taken. The record discloses that the district court, in making its findings, computed interest at the rate of twenty per cent on the several sums paid by the plaintiff for the purchase of each lot, at the sale thereof for delinquent taxes, and subsequent taxes paid thereon for the period of two years from and after each payment, and at the rate of ten per cent thereafter. The tax sales in question were not invalid; therefore, plaintiff was entitled to interest on the amount bid at the sale, and the several sums paid for subsequent taxes, at the rate of twenty per cent per annum from the date of the tax certificate and said several payments respectively until the expiration of two years from the date of said sale, and ten per cent interest after that time. (See *Merriam v. Ranen*, 23 Neb., 217; *Alexander v. Thacker*, 43 Neb., 494.) The district court erred in allowing interest at the rate of twenty per cent per annum on each payment for two years from the date of such payment, instead of until the expiration of two years from the date of the tax certificates. We have computed the amount due plaintiff at the date of the rendition of the decree in the court below, according to the rule established by the foregoing decisions, which computation shows that the sum due the plaintiff on his first cause of action to be \$373.74, and on his second cause of action to be \$641.73. The decree of

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the district court is accordingly modified, and plaintiff is given a lien on lot 14 for said first mentioned sum and a lien on lot 15 for the last named amount, with ten per cent interest on each sum from the date of the entry of the decree in the district court until the day of payment.

Complaint is made of the allowing of the plaintiff an attorney's fee in the action. The holder of a tax lien, on the foreclosure thereof, if the sale on which the lien is based is valid, is, under the statute, entitled to an attorney's fee of ten per cent of the amount of the decree. (Sec. 181, ch. 77, Comp. Stats.; *Toule v. Shelly*, 19 Neb., 632; *Adams v. Osgood*, 42 Neb., 450; *Alexander v. Thacker*, *supra*.) The awarding of an attorney's fee in this case was proper; but as the amount allowed as such fee exceeds ten per cent of the sum found due the plaintiff by the court, the decree in that respect is modified by reducing the attorney's fee to \$37.37 for the first cause of action, and for the second cause of action to the sum of \$64.17.

The county of Lancaster sets up in its cross-petition a lien on the lots arising by virtue of decree of foreclosure rendered in the district court of the county. In the case at bar the county was given a lien for the amount of the decree, with ten per cent interest thereon. The only complaint made relates to the rate of interest allowed. Appellants insist that the county was only entitled to seven per cent interest. The evidence, without conflict, shows that interest was computed at the proper rate, on the decree in favor of the county, as well as on the decree in favor of Mr. Burr. The findings and decree in the case under review are modified as indicated above, and, as thus modified, are

AFFIRMED.

F. W. BARNES v. D. A. HALE.

FILED APRIL 3, 1895. No. 5167.

NOTE: MODIFICATION AFTER TERM. The power of a district court to vacate or modify its own judgments after the term which they were rendered is limited to the grounds for grant-such relief enumerated in section 602 of the Code of Civil edure.

R from the district court of Madison county. Tried fore POWERS, J.

L. Robertson and S. O. Campbell, for plaintiff in

Robinson & Reed, contra.

ISON, J.

Hale commenced an action in the district court of county, the object being to obtain the relief stated ayer of the petition, which was as follows: "Where- r petitioner prays that this court enter a judgment ee in this case reforming the deed of conveyance-eal estate from the defendant to the plaintiff, by it embrace said entire block of land, or so much as the defendant is in a situation to convey in ac- with the contract of the parties, the plaintiff xpressing a willingness to accept whatever title de- had in the said land at the commencement of this hat if the defendant fails to comply with the decree birty days from its date, the clerk of this court be d a commissioner, with full power to make, exe- record said conveyance in the name and on behalf efendant, and he be directed to so convey said block aintiff; that if the court shall find on the trial of

44	355
154	186
44	355
38	477

Barnes v. Hale.

this case that for any reason a conveyance should not be desired as herein prayed, that then a decree and judgment be entered in the case setting aside said contract entirely and awarding a judgment against the defendant and in favor of the plaintiff for the sum of \$250, with interest thereon from July 31, 1886, and that the plaintiff have such other and further relief in this cause as may be just and equitable, together with costs of suit." The cause was tried and submitted to the court and a decree rendered in words and figures as follows:

"On November 23, 1888, it being the adjourned term of the regular October, 1888, term of this court, this cause came on to be heard upon the petition, answer, and evidence in the case and was submitted to the court, who took the case under advisement, on consideration whereof the court did, on the 17th day of May, 1889, it being the adjourned regular April, 1889, term of the district court in Madison county, Nebraska, find for the defendant, denying the plaintiff's claim for reformation of the deed, and denying the plaintiff's claim for specific performance of the contract set forth in plaintiff's petition.

"The court further finds that the plaintiff is entitled to a rescission of the said contract, upon his conveying to the defendant within thirty days from May 17, 1889, the south half of said block 59, in the Railroad Addition to the town of Madison, in Madison county, Nebraska, by deed of general warranty, a good and sufficient title free from any incumbrance; and if the plaintiff shall convey said premises, he shall have judgment against the defendant for the sum of \$250, and that the plaintiff pay all the costs of this action to the time of trial, and the defendant the balance.

"It is therefore considered, adjudged, and decreed by the court that the plaintiff is not entitled to a specific performance of the contract set out in the petition, but that if the plaintiff convey to the defendant within thirty days from this date the south half of block 59, in Railroad Addition

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to the town of Madison, in Madison county, Nebraska, by good and sufficient deed with covenants of general warranty and free from all incumbrances, he may have judgment against the defendant for the purchase price thereof, \$250 Plaintiff to pay all costs made up to the time of going to trial, and defendant to pay the remaining costs."

On April 14, 1890, there was filed for D. A. Hale the following motion:

"The plaintiff herein moves the court to correct the judgment in this case as follows:

"1. By permitting the deeds filed in this court, respectively, June 7, 1889, and August 21, 1889, to stand as a compliance with the decree of this court.

"2. By entering an absolute money judgment against the defendant, and directing the clerk of this court to issue an execution against the defendant thereon.

"3. By retaxing and readjusting the costs of the case in compliance with the judgment of the court."

This was accompanied by some affidavits in relation to matters of fact pertaining to the grounds of the motion. F. W. Barnes, defendant in that court and plaintiff in error in this, appeared by counsel and resisted the motion, interposing objections to its allowance as follows:

"Now comes the defendant and objects to the court making the order, judgment, and decree asked for by plaintiff in his motion filed in this case, April 14, 1890.

"1. Because the deeds made and delivered by the plaintiff and his wife to the clerk June 7, 1889, and August 21, 1889, and which the clerk filed with the papers in this case, is not a compliance with the order and decree of this court.

"2. Because this being an action in equity, this court cannot enter an absolute money judgment.

"3. Because the plaintiff has failed, neglected, and refused to comply with the order and decree of the court in this action in many particulars; that the plaintiff failed, re-

fused, and neglected to deed the premises in controversy to the defendant within the time required by the order of the court, and he failed to deed it to the defendant with as good and sufficient title as he received from the defendant; that at the time the plaintiff and his wife made the deed aforesaid there were several unsatisfied judgments against the plaintiff on record, and the same are still unsatisfied; that the taxes for the years 1888 and 1889 on said premises were unpaid and a lien on said premises; that there were no judgments, liens, or tax liens against said premises when they were deeded to the plaintiff by the defendant.

"3. Because this court has no authority to change or modify its decree, as requested by the plaintiff, upon motion.

"4. Because the costs have been taxed in this case in accordance with the decree of the court.

"5. Because it would work a great hardship to the defendant to now have to take said premises, as he has changed his residence and now resides in the state of California, and had the plaintiff desired the defendant to have had the property, and had complied with the terms and conditions of the decree of the court in this case, this defendant could have disposed of said premises while residing in Madison, Nebraska.

"And in support of this objection the defendant offers the affidavit and abstract hereto attached and made a part hereof, also the papers and judgment entries made in the case."

The paper upon which was set forth the above list of objections was, it appears, filed February 18, 1891, and the court, after hearing on the motion, made an entry as follows:

"And now on this 25th day of February, 1891, it still being a day of the regular February, 1891, term of this court, this cause came on for hearing upon the motion of plaintiff for an order requiring the clerk of this court to issue an execution against the defendant to recover the sum

of \$250, with interest thereon at seven per cent from August 20, 1889, and was submitted to the court, on consideration whereof said motion is sustained.

“It is therefore considered by the court that the plaintiff recover from the defendant the sum of two hundred and fifty dollars (\$250), with interest at seven per cent thereon from August 20, 1889, to this date (February 25, 1891), amounting to the further sum of twenty-six and $\frac{49}{100}$ dollars (\$26.49), amounting in the aggregate to two hundred and seventy six and $\frac{49}{100}$ (\$276.49); and that the clerk of this court is hereby commanded to issue an execution carrying into effect this judgment, a sufficient amount of the proceeds thereof to be retained by the clerk and applied in satisfaction of the tax liens upon the property in controversy in Madison county, Nebraska, accruing while title thereto was in the plaintiff; to which judgment and ruling of the court the defendant excepted, and forty days allowed in which to prepare and present to the adverse party or his attorneys his bill of exceptions. Supersedeas bond fixed at \$525.”

An examination of the record and affidavits filed in support of and against the granting of the motion discloses that after the original decree rendered by the court May 17, 1889, there was filed on June 7, 1889, by D. A. Hale with the clerk of the district court a deed which was intended to convey to plaintiff in error “the south half of lot numbered fifty-nine (59) of Railroad Addition to the town of Madison,” and that on August 21, 1889, there was filed with the clerk another deed which was intended to convey to him, as it states, “the south half of block number fifty-nine (59) of Railroad Addition to the town of Madison,” and which also contained this further statement: “This deed is given as a deed of correction of a deed made by D. A. Hale and Amelia Hale, his wife, to F. W. Barnes, dated on the 4th day of June, 1889, which last named deed was filed with the clerk of district court

Barnes v. Hale.

of Madison county, Nebraska, on the 7th day of June, 1889." It further appears that there were unpaid taxes and some judgments of record against defendant in error unsatisfied.

It is quite clear that the court in its original decree in this case did not render a personal judgment against the plaintiff in error and that the motion filed by defendant in error and acted upon by the court was an attempt in the nature of a supplemental proceeding to obtain such a judgment and not by reason of compliance by defendant in error with the decree of the court, for he had not delivered to plaintiff in error a warranty deed within thirty days of the entry of the decree, of the property described in the petition, the subject of litigation, and free from all incumbrances, but by virtue of occurrences stated in the motion which had wholly arisen subsequent to the rendition of the judgment and some of which had their origin in the failure or neglect of the defendant in error to perform the acts required of him by the judgment in the manner therein prescribed. The issues in the case had been tried and determined by the court and its judgment thereon pronounced, and the decree rendered must be viewed as an adjudication upon the matters in litigation and, as such, not be set aside by this motion and questions which originated since the decree was rendered, made the subject of litigation and adjudication in the action. It was not proper to do this upon motion. (*Kenyon v. Baker*, 47 N. W. Rep., [Ia.], 977; *Woffenden v. Woffenden*, 25 Pac. Rep. [Ariz.], 666; Freeman, Judgments, sec. 100.) The motion of defendant in error was filed after the close of the term, during which the case was tried and judgment rendered, and there was no allegation in the motion of either of the grounds mentioned in section 602 of the Code of Civil Procedure. It is well settled that a district court has no power to vacate or modify its own judgments after the term at which they were rendered, except for at least one of the grounds enumerated in

Browne v. Edwards & McCullough Lumber Co.

such section of the Code. (*Carlow v. Aultman*, 28 Neb., 672; *McBrien v. Riley*, 38 Neb., 561.) The portion of the motion which referred to the costs and asked for retaxation of them does not seem to have been considered by the district court, or if it was, no disposition of it was made, or at least none is shown in the record; hence there is nothing in this point of the motion presented for examination at this time. The action of the court and entry made on the hearing of the motion of defendant in error is reversed and the cause remanded.

REVERSED AND REMANDED.

JOHN F. BROWNE ET AL. V. EDWARDS & MCCULLOUGH
LUMBER COMPANY ET AL.

FILED APRIL 3, 1895. No. 6390.

44	361
46	715
44	361
46	887
44	361
52	46
44	361
56	627
56	646

1. **District Courts: JUDGES: AUTHORITY AT CHAMBERS.** "The judges of the several district courts, as such, have no inherent authority at chambers whatever, but only such as the statutes give them." *Ellis v. Karl*, 7 Neb., 381, followed.
2. ———: ———: ———: **INJUNCTION.** The authority of district judges at chambers in injunction cases is limited by law to the power "to grant, dissolve or modify temporary injunctions" and does not include a final disposition of the cause, either by dismissal or otherwise.
1. **Injunction Bonds: ACTION BEFORE TERMINATION OF SUIT.** No right of action accrues upon an injunction bond given on the granting and issuance of a temporary injunction in an action commenced to obtain a perpetual injunction until the final determination of the suit in which the temporary order was granted, and an action at law instituted on the undertaking prior to the final disposition of the cause is prematurely brought and cannot be maintained.
1. ———: ———: **EVIDENCE.** Held, that the evidence in this case does not show a final determination of the suit in which the injunction bond upon which it is based was given.

Browne v. Edwards & McCullough Lumber Co.

ERROR from the district court of Cedar county. Tried below before NORRIS, J.

A. M. Gooding and Benjamin M. Weed, for plaintiffs in error.

Wilbur F. Bryant and J. C. Robinson, contra.

HARRISON, J.

It appears from the pleadings in this case that on the 11th day of September, 1891, John F. Browne, of plaintiffs in error (hereinafter referred to as "plaintiffs"), commenced an action in the district court of Cedar county against defendant in error (hereinafter called the "Lumber Company") and obtained a temporary order of injunction by which the Lumber Company was restrained from selling or causing to be sold, or in any manner interfering with, Browne's right of possession of certain personal property of which he then held possession, as sheriff of Cedar county, by virtue of an execution issued by the county court of said county in an action wherein the Lumber Company was plaintiff and Browne defendant; that upon the granting of the temporary injunction an undertaking was executed by John F. Browne as principal and Peter Garney, Joseph Morton, Theodore Beste and T. H. Cole as sureties; that a motion was filed by the Lumber Company to vacate the temporary injunction, and upon the hearing of the motion by the judge of the district court at chambers, during vacation, the order of injunction was dissolved, and it is claimed the judge then further ordered or attempted a dismissal, or to make a full disposition of the cause. The Lumber Company then instituted this action upon the injunction undertaking to recover its damages alleged to have been suffered by reason of the operation of the order of injunction while in force, and in a trial of the issues to the court, a jury having been waived, was successful and obtained a judgment

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for such damages, and from which disposition of the issues these proceedings in error have been prosecuted to this court.

Subsequent to the filing of the papers here a motion was interposed on behalf of the Lumber Company, asking the court to strike the bill of exceptions from the files, assigning as a reason therefor that it was not prepared and served within the time prescribed by law, or that fixed by the trial court, also to dismiss the case for want of prosecution, and the questions raised by this motion are argued in connection with the merits of the case in the brief presented for the Lumber Company; but it appears from the record that on October 24, 1893, the motion was denied, hence we will not give it further consideration at this time.

It is contended by plaintiffs that the judge had no jurisdiction at chambers to consider the merits of the cause, or to finally dispose of it by dismissal or otherwise. Section 23 of article 6 of the constitution provides: "The several judges of the courts of record shall have such jurisdiction at chambers as may be provided by law." And it has been provided by the legislature (see secs. 39 and 57, ch. 19, Comp. Stats., 1893): "That any judge of the district court may sit at chambers at any time and place within his judicial district, and while so sitting shall have the power, 1. To grant, dissolve or modify temporary injunctions. * * * 4. To discharge such other duties or to exercise such other powers as may be conferred upon a judge in contradistinction to a court;" and in section 252 of our Code of Civil Procedure, under the heading "Injunction," the allowance of an injunction is provided for as follows: "The injunction may be granted at the time of commencing the action, or at any time afterward, before judgment, by the supreme court or any judge thereof, the district court or any judge thereof, or in the absence from the county of said judges, by the probate judge thereof, upon it appearing satisfactorily to the court or judge by the affidavit of the plaintiff

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or his agent that the plaintiff is entitled thereto;" and in section 263 the right to move to vacate the order of injunction is given, and it is therein stated that such application may be made "to the court in which the action is brought or any judge thereof," etc. In the case of *Ellis v. Karl*, 7 Neb., 381, this court said that under the constitution "the judges of the several district courts, as such, have no inherent authority at chambers whatever, but only such as the statutes give to them." We have quoted, or given, the substance of the statutes in which authority is conferred upon a judge at chambers in regard to injunctions, and it is clearly limited in respect to a motion to vacate, such as was the one in this case, to its dissolution or modification; and if the judge disposed of the main case on the hearing at chambers of the motion to vacate the temporary order, such action was without authority on his part and unwarranted and of no effect.

On the hearing of the motion to vacate the temporary injunction the district judge, as appears from a copy of the journal entry of the proceedings, made and caused to be entered of record in the clerk's office the following order: "Now on this 24th day of September, 1891, this cause came on to be heard upon the motion of the defendants to vacate the temporary injunction, heretofore granted in this case, and was submitted to the court upon affidavits and arguments of counsel, and the court being fully advised in the premises, does sustain said motion, and said injunction is hereby vacated and dismissed, to which plaintiff excepts." From a perusal of this order it seems very evident that there was no attempt on the part of the judge to go beyond his jurisdiction or to do anything more than set aside the temporary order of injunction. It is headed, "Order Dissolving Injunction," which makes apparent the intention of the judge with reference to what was to be included in it, and it states in the body that "the court being fully advised in the premises,

does sustain said motion, and said injunction is hereby vacated and dismissed." There is nothing contained in the entry which can in the least be construed as alluding to the main case, or as an attempt to dispose of it in any manner or to any degree. That the word "dismissed" is used in connection with the disposition of the temporary injunction affords no ground for the statement that the cause itself was dismissed or attempted to be, as it plainly refers and applies to the injunction, and though the word "dissolved" is almost universally used in this entry, "dismissed," when given the meaning "discharged," while probably not a strictly proper use of it, alluding to the termination of a temporary order of injunction, we think it an allowable one, and we conclude, so far as the record discloses, there was and has been no final disposition of the case in which the temporary injunction was granted. If this be true, then this action was prematurely brought, as no action at law can be maintained upon the injunction bond until the final determination of the cause in which the injunction issued. (High, Injunctions, sec. 1649; *Bemis v. Gannett*, 8 Neb., 236.) "This right of action on the bond cannot accrue until there has been a final decree in the cause in which the bond is given. The order dissolving an injunction before final hearing is interlocutory merely from which no appeal would lie (*Thomas v. Wooldridge*, 23 Wall. [U. S.], 283; *Young v. Grundy*, 6 Cranch [U. S.], 51; *Moses v. Mayor*, 15 Wall. [U. S.], 387); and we have not been cited, nor have we found, a well considered case in which it has been held that an action on an injunction bond could be maintained before final decree in the cause in which such bond was given. The authorities are all the other way (2 High, Injunctions, sec. 1649; *Gray v. Veirs*, 33 Md., 159; *Penny v. Holberg*, 53 Miss., 567; *Murfree*, Official Bonds, p. 393, secs. 391, 392; *Bemis v. Gannett*, 8 Neb., 236; *Bentley v. Joslin*, Hemp. [U. S.], 218; *Clark v. Clayton*, 61 Cal., 634; *Weeks v. Southwick*,

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12 How. Pr. [N. Y.], 170; *Brown v. Galena Mining Smelting Co.*, 32 Kan., 528, 4 Pac. Rep., 1013.) It follows in this case, then, that although the injunction was dissolved in the district court before final hearing, yet a right of action accrued on the bonds, or could accrue, until a final decree had been rendered in the cause in which such bond was given." (*Cohn v. Lehman*, 6 S. W. Rep. [Mo.] 267; *Jones v. Ross*, 29 Pac. Rep. [Kan.], 680.) The judgment of the district court must be reversed and the cause remanded.

REVERSED AND REMANDED.

WILLIAM THOMPSON V. STATE OF NEBRASKA.

FILED APRIL 3, 1895. No. 7331.

44	366
58	811
44	366
60	115

1. **Rape: EVIDENCE OF INABILITY OF PROSECUTRIX TO RESIST.**
In a prosecution for the crime of rape, where it appears from the record that the person upon whom the crime was alleged to have been committed was but sixteen years of age, had suffered a physical injury which still affected her and partially deprived her of physical strength, and was "simple minded" and acted upon by fear, *held*, that these facts must be considered by the jury in connection with all the attendant facts and circumstances of the alleged crime to determine whether the resistance to the act was such as to show non-consent of the prosecutrix and constitute the act rape.
2. ———: **SUFFICIENCY OF EVIDENCE TO SUSTAIN CONVICTION.**
The evidence examined, and *held* sufficient to sustain the verdict.
3. ———: **ADMISSION OF TESTIMONY.** The action of the court in admitting testimony examined, and *held* not erroneous.
4. **Criminal Law: REVIEW: EXCEPTIONS TO ADMISSION OF TESTIMONY.** Where no objections are made nor exceptions taken to the admission of testimony in the trial court, such act cannot be reviewed in this court.
5. **Assignments of Error: INSTRUCTIONS: EVIDENCE.** It is

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signed for error that the court erred in giving paragraphs 2, 3, 5, 7, 8, and 10 of the instructions given by the court on its motion, for the reason that under the evidence the court could have instructed the jury to acquit the defendant and not to submit the question of his guilt to the jury. *Held*, that the determination that there was sufficient evidence to sustain a verdict against defendant meets this objection to the instructions.

CRIMINAL LAW: ASSIGNMENTS OF ERROR: REVIEW. Where in an assignment of error in a motion for new trial it is stated that the court erred in refusing to give a group of instructions, it will be examined or considered no further when it is ascertained that the refusal to give any one of the instructions was proper. (*Clark v. Mitchell*, 40 Neb., 684.)

APPEAL to the district court for Dawson county. Tried before HOLCOMB, J.

Edin & Leek, for plaintiff in error.

S. Churchill, Attorney General, for the state.

DEFENDANT, THOMPSON, J.

During the month of September, 1894, at a term of the district court then being held in the county of Dawson, the plaintiff in error, William Thompson, was convicted of the crime of rape upon one Carrie Brockett, committed August 8, A. D. 1894. After motion for new trial filed in October, the same was overruled and he was sentenced to imprisonment in the penitentiary for the period of three years, and he has removed the case to this court to obtain a writ of error of the proceedings during the trial in the district court.

The assignment of error which seems to be mainly relied upon by plaintiff in error is that the verdict was not supported by sufficient evidence. In the district court the defendant produced evidence of an *alibi*, but the testimony going to this branch of the case was conflicting, and it is urged by counsel in the brief filed that the finding of the

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jury on this subject cannot be disturbed. The testimony discloses that the prosecutrix, Carrie Brockett, was but sixteen years of age at the time the crime was committed; that during the month of August, 1893, "she fell off a horse" and broke her collar bone, and that on May 18, 1894, the date of the alleged crime, her right arm and shoulder felt very sore and she could not and had not used it to do much heavy work since the time it was injured. She was at the time living with her grandmother, who was very deaf, almost bedridden, and partially demented, and nursing and attending her. They lived in a house in the town of Lexington, and were the only occupants of the house. A physician, who made regular professional calls at the house to render such medical assistance or relief as was needed by the grandmother, testified that the prosecutrix was a simple-minded girl, or was mentally weak and not possessed of the average intellect of girls of her age, and there was testimony of one other witness which was slightly corroborative of the physician's evidence on the subject of the Brockett girl's deficiency in mental development or capacity.

The house in which the girl and her grandmother resided was, as she testifies, located about four blocks from the court house in the city of Lexington, fronted on the street to the south of it, and there was what they called an east room, a west room, and a summer kitchen. The east room was used as a bedroom by the prosecutrix and her grandmother. There was an outer door to what was called the west room, and she states that about 9 o'clock of the evening or night of the 18th of May, 1894, some one knocked at this door, and when she opened it she saw the accused standing there, and he stated to her he had been informed the house was for rent, and requested to be allowed to see the rooms; that she took the lamp which was then in the west room and conducted him through the house, into the east, or bedroom, into the summer kitchen,

and back into the west room. She placed the lamp upon a table and stood behind a rocking chair near the table; that the accused talked about the house, and coming toward her, put his hand upon hers and then threw his arms about her waist; that she tried to get away from him and he stumbled over a box; that just then the grandmother called her, and after asking him to go home she went into the east room to see what was wanted. He followed, and she then went again into the west room after the light, and he immediately followed, closed the door between the two rooms, put his arm or arms around her and held her hands in his, pulled or led her from the door to the table on which the lamp stood, and with one hand turned the light down, and then put his right hand under her knees and carried her over next to one side of the room and threw her down. She states that during the whole time she was trying to release herself, but was unable to do so; that she did not kick or bite him or make any outcry, but struggled to get her hand loose and keep her dress down with her right hand, of which he did not have hold or control; that when he threw her down she said to him, "For God's sake let me up." She further stated that when they were on the floor he was by her side; that he obtained control of both her hands and pulled up her clothes; that she had her feet crossed and was fighting to keep him off; that he then got on top of her and put his foot between her legs and pulled them apart and accomplished his purpose, got up and sat in a chair, and, when she was getting up, caught her and pulled her down on his lap and held her there and talked to her for possibly a few moments, when she asked him to take his cap and go home and he went away. When asked if she made any outcry, and why she did not strike him, she answered that she did not because she was afraid of the accused, and she feared him because he had been drinking whiskey, and that she knew this to be so from smelling his breath. She did not tell any person of

what had occurred until the following day. The prosecutrix also testified that while at the house the accused told her his name was William Thompson. It further appears from her testimony that there was a house right across the street and west from this one in which it was alleged the rape was committed, and one just across the road northwest, and another, the doctor's house, in the adjoining block.

It seems very clear from an examination of all the testimony that the finding of the jury to the extent that the party who did the deed fully intended to employ all the force which might become necessary to enforce his will and pleasure, and did use all that became needful to overcome the resistance made by the girl, was sufficiently shown by the evidence; but it is strenuously argued that the prosecutrix did not resist the attacks upon her as energetically as she should, by the use of all the natural agencies and powers which she possessed and which might have been employed for such purpose; that she made no outcry and did not kick, bite, or strike the party who made the assault, and that it must be concluded that she consented to the act of sexual intercourse, and the finding of the jury, embracing, as it must have done, as one of its constituents, non-consent on her part, was wrong and not supported by the evidence. In support of this assignment the case of *Oleson v. State*, 11 Neb., 276, is cited, in which the general doctrine on the subject of resistance in cases of rape was announced in the following language: "To constitute the crime of rape, where it appears that at the time of the alleged offense the prosecutrix was conscious and had possession of her natural, mental, and physical powers, and was not terrified by threats or in such position that resistance would be useless, it must appear that she resisted to the extent of her ability;" and in the body of the opinion there appears a quotation from the case of *People v. Morrison*, 1 Parker Crim. Rep. [N. Y.], 625, as follows: "To constitute the crime there must

be unlawful and carnal knowledge of a woman by force, and against her will. * * * The prosecutrix, if she was the weaker party, was bound to resist to the utmost. Nature had given her hands and feet with which she could kick and strike, teeth to bite, and a voice to cry out; all these should have been put in requisition in defense of her chastity." We understand that where it is apparent from the testimony that these things were or were not done by the party upon whom it is alleged the rape was committed, it is matter of evidence to be considered by the jury in connection with all the other facts and circumstances surrounding and elements of the crime charged and from which, combined, the jurors must determine their verdict. The rule stated in *Oleson v. State*, *supra*, as a general rule, is a correct one and has, since the decision, been adhered to by this court, but the application of this rule must and will be governed and modified by the circumstances and facts surrounding each particular case.

In the case of *People v. Connor*, 27 N. E. Rep. [N. Y.], 252, it was decided: "The evidence showed that the defendant was a strong man of mature years, engaged in conducting an intelligence office; that the prosecutrix was a girl, only a little over sixteen, who went to his office to obtain employment; that defendant suddenly assaulted her while they were alone together in his office; that she struggled to get away from the defendant, and continually requested him to release her, and that she did not cry out because she was too frightened to do so. Held that the jury were justified in finding that she resisted to the extent of her existing ability;" and the court states in its opinion: "It is quite impossible to lay down any general rule which shall define the exact line of conduct which shall be pursued by an assaulted female under all circumstances, as the power and strength of the aggressor, and the physical and mental ability of the female to interpose resistance to the unlawful assault, and the situation of the par-

ties, must vary in each case. What would be the proper measure of resistance in one case would be totally inapplicable to another situation accompanied by differing circumstances. One person would be paralyzed by fear and rendered voiceless and helpless by circumstances which would only inspire another with higher courage and greater strength of will to resist an assault. A young and timid child might, we think, be easily overpowered and deprived of her virtue before she had an opportunity to recover her self-possession and realize her situation, and the necessity of the exercise of the utmost physical resistance in order to preserve her virtue. It would be unreasonable to require the same measure of resistance from such a person that would be expected from an older and more experienced woman who was familiar with the springs and motives of human action and acquainted with the means necessary to be used to protect her person from violence. * * * When an assault is committed by the sudden and unexpected exercise of overpowering force upon a timid and inexperienced girl, under circumstances indicating the power and will of the aggressor to effect his object, and an intention to use any means necessary to accomplish it, it would seem to present a case for a jury to say whether the fear naturally inspired by such circumstances had not taken away or impaired the ability of the assaulted party to make effectual resistance to the assault." See, also, *People v. Dohring*, 59 N. Y., 383, where it is said: "Of course the phrase, 'the utmost resistance,' is a relative one, and the resistance may be more violent and prolonged by one woman than another, or in one set of attending physical circumstances than another. In one case, a woman may be surprised at the onset and her mouth stopped so that she cannot cry out, or her arms pinioned so that she cannot use them, or her body so pressed about and upon that she cannot struggle." The nature and the extent of the resistance which ought reasonably to be expected in each particular case must necessarily

depend very much upon the peculiar circumstances attending it; and hence it is quite impracticable to lay down any rule upon that subject as applicable to all cases involving the necessity of showing a reasonable resistance. (*Felton v. State*, 39 N. E. Rep. [Ind.], 228; *Anderson v. State*, 104 Ind., 467, 474, 4 N. E. Rep., 63, and 5 N. E. Rep., 711; *Ledley v. State*, 4 Ind., 580; *Pomeroy v. State*, 94 Ind., 96; *Commonwealth v. McDonald*, 110 Mass., 405; 2 Bishop, Criminal Law, sec. 1122.)

In the opinion in the case of *Hammond v. State*, 39 Neb., 252, POST, J., says with reference to an instruction in which it was stated: "In order to convict, they must find that the prosecutrix resisted to the extent of her ability in view of the circumstances surrounding her at the time.' Such, undoubtedly, is the general rule, but to that rule there are some recognized exceptions, among which is that where the female assaulted is very young and of a mind not enlightened on the subject, the law exacts a less determined resistance than in the case of an older and more enlightened person. (2 Bishop, Criminal Law, 1124; Wharton, Criminal Law, 1143.) * * * There exists a wide difference between consent and submission, particularly in the case of a female of tender years when in the power of a strong man. Mere submission in that case is essentially different from such a consent as the law declares to be a justification of the act. (3 Russell, Crimes, 934.) Coleridge, J., in *Reg. v. Day*, 9 C. & P. [Eng.], 722, thus distinguishes: 'Every consent involves a submission; but it by no means follows that a mere submission involves consent. It would be too much to say that an adult submitting quietly to an outrage of this description was not consenting. On the other hand, the mere submission of a child when in the power of a strong man, and most probably acted upon by fear, can by no means be taken as such consent.' "

In the case at bar the testimony disclosed that the party

alleged to have been assaulted was but sixteen years of age, and although of sufficient mental capacity to be placed and left in charge of the house and her invalid, almost helpless, and partially demented grandmother, and to do the necessary housework, that she was "simple minded," not of average mentality, and, moreover, that she was partially disabled physically, her collar bone having been broken a few months prior to the time of the assault, and that the injured portion of her body was still causing her pain and she was unable to employ the right arm in doing any heavy work; that the accused, when they were in the room alone and no one in the house who could be of any assistance to her (for the grandmother, according to her testimony, would have been powerless to aid her), pinioned her, or caught her around the body, held her hands and disabled her from offering resistance. Combining these facts with her testimony that she did struggle all she could and was afraid to offer further resistance to his efforts because he had been drinking whiskey, and other facts and circumstances connected with the alleged crime, as detailed in the evidence, we are satisfied that there were sufficient evidential facts apparent in the testimony to sustain a finding by the jury that there was no consent to the sexual intercourse by the prosecutrix during any portion of the act, and that she made such resistance as it was reasonable to expect her to do to manifest her opposition, when we consider her age, her strength physically, and the light or understanding which she possessed mentally, and all the other attendant facts and circumstances. If so, this was sufficient. (Wharton, Criminal Law, sec. 557; *Commonwealth v. McDonald, supra.*)

One assignment of the petition is that the court erred in giving paragraphs 2, 3, 4, 5, 7, 8, and 10 of the instructions given on its own motion, for the reason that under the evidence the court should have instructed the jury to acquit the defendant, and not have submitted the question of his

guilt to the jury. Having concluded that there was sufficient evidence to sustain a verdict of guilty, we have, in effect, determined the question raised by this allegation of the petition and need not further examine it. There being no fault found with any particular one of the instructions, but a general complaint directed against all of them that they should not have been given, but in their stead there should have been a direction to the jury to acquit the defendant, based upon the insufficiency of the evidence, a determination that there was evidence sufficient to submit to the jury completely answers this objection to the instructions. It is claimed in the petition that the trial court erred in admitting a portion of the evidence of one of the witnesses for the state, Philip Yocum, found on page 35 of the bill of exceptions. We have examined all of the evidence on the page indicated to the admission of which any objection was interposed, and in our opinion there is none which could in any degree prejudice the accused in his rights or mislead the jury. Hence, if there was any error it was not prejudicial.

It is further alleged that the court erred in admitting the evidence of John A. Funke, one of the witnesses for the state, and for such testimony we are directed by the petition to pages 37, 38, and 39 of the transcript of the evidence. The only interrogatory on either of the pages to which any objection was made is the following: "Q. State if on the 19th day of May, 1894, you saw the defendant Thompson. Defendant objects as immaterial and irrelevant. Overruled. Exception. A. Yes, sir." There was nothing in this question nor its answer which was harmful to the accused or his interests. All the testimony on the pages designated, except this just quoted, was received without objection, and at the close of the evidence given by this witness the attorneys for the accused asked that it all be stricken out, and it was so ordered by the court, except a small portion of it, and to the ruling of the

Scott v. Cornish.

court allowing this small portion to remain in the record there was no objection or exception; hence there is nothing in this assignment of the petition in which we can discover any available error.

It is argued that the court erred in refusing to give certain of the instructions offered and requested by the defendant. In the motion for a new trial appears the following statement in regard to these instructions: "The court erred in refusing to give the first, second, third, fourth, and fifth paragraphs of instructions asked for by the defendant and duly excepted to at time of said refusal." It is conceded by counsel for the accused that at least one, if not two, of the instructions referred to in the foregoing quotation from the motion for a new trial were properly refused. This being conceded or determined, the action of the court in this particular will not be further examined, as where, in a motion for a new trial, it is alleged that the court erred in refusing to give a group of instructions, it will be examined or considered no further when it is ascertained that the refusal to give any one of the group of instructions was proper. (*Jenkins v. Mitchell*, 40 Neb., 664; *Hedrick v. Strauss*, 42 Neb., 485.) The judgment of the district court must be

AFFIRMED.

THOMAS C. SCOTT ET AL., APPELLEES, V. JOSEPH F. CORNISH ET AL., APPELLANTS.

FILED APRIL 3, 1895. No. 6242.

Review: DISMISSAL OF APPEAL: COSTS: JUDGMENT WITHOUT FINDING. The appeal of a party against whom alone the district court had found having been dismissed, the right of the remaining appellant to be relieved of costs is recognized in view of the fact that appellees have waived the want of a motion for such relief.

APPEAL from the district court of Douglas county.
Heard below before HOPEWELL, J.

Jacob Fawcett, for appellants.

J. W. Roudebush, contra.

RYAN, C.

In this action the appeal of Joseph F. Cornish was dismissed for want of prosecution October 2, 1894. The rights of the other appellant, C. C. Stanley, are now presented for determination. The record discloses no finding whatever against the appellant last named, and the judgment against him was merely for costs. The appellees do insist, as technically they might, that an alleged error in the taxation of costs, when that is the sole question in dispute, should be presented in the district court by an appropriate motion. It is argued that since there were allegations in the petition that the contract assailed thereby was obtained by fraud through a conspiracy between the appellants, the finding that Joseph F. Cornish was guilty of fraud, as charged in the petition, was, by direct implication, a finding that C. C. Stanley was likewise guilty. It seems to us that this is too far fetched, for the finding of fraud does not necessarily involve the existence of a conspiracy, especially as this affirmative finding was alone in respect to one individual, who by no possibility could be guilty of conspiracy with himself. The judgment of the district court against C. C. Stanley is therefore

REVERSED.

Elgutter v. Drishaus.

CHARLES S. ELGUTTER, ADMINISTRATOR V. HERMAN
DRISHAUS.

FILED APRIL 3, 1895. No. 6357.

Landlord and Tenant: NOTICE OF INTENTION TO QUIT: WAIVER. A landlord, by accepting without objection the possession of leased premises, may be deemed to have waived such right as otherwise he might have had to insist upon notice of his tenant's intention to quit, even though before such acceptance of possession the landlord had notified the tenant that he would insist upon such notice.

ERROR from the district court of Douglas county. Tried below before SCOTT, J.

Charles S. Elgutter, pro se.

McCabe, Wood, Newman & Elmer, contra.

RYAN, C.

By the terms of a written contract between the parties to this action the plaintiff in error leased to the defendant in error certain described real property in Omaha, at a monthly rental of \$35. The term of the lease was one year, beginning August 15, 1890. After the expiration of this particular year the defendant in error continued to occupy the premises, paying in advance monthly rent at the rate above stipulated. The last of these payments was made about February 1, 1892. On the 3d day of the month last named defendant in error sent to plaintiff in error a communication in the following language:

“OMAHA, February 3d, 1892.

“*Charles Elgutter, Esq., Omaha, Neb.*—DEAR SIR: I beg to inform you that I have rented a new house and intend to move by February 15th. I regret that I have no time to give you longer notice, and you are at liberty to

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put a sign up now, and shall be pleased to show anybody the house while we occupy it. Should the weather be very severe by that date, and I be compelled to remain in the house a few days longer, I trust it will be satisfactory if I pay you rent up to the date I move, unless of course you should have rented it by the 15th. Please state if this is satisfactory, and oblige,

“Yours truly,

H. DRISHAUS.”

On the day following the last above date plaintiff in error sent the following reply to the defendant in error:

“FEBRUARY 4, 1892.

“*Mr. H. Drishaus, City*—DEAR SIR: In reply to yours of the 3d, relative to vacating the house, it will be necessary for me to require of you the usual statutory notice of one month. Trusting this is satisfactory, I am,

“Yours truly,

CHARLES S. ELGUTTER.”

Before February 15, 1892, defendant in error removed from the aforesaid premises and sent to plaintiff in error the keys of the house situated thereon. Plaintiff in error accepted said keys without further protest or communication to defendant in error and entered upon said premises and began making repairs for his own interest without notice to defendant in error. This action was brought to recover \$35 as rent for the month which followed February 15, 1892, on the theory that the defendant in error was bound in advance to give thirty days' notice to terminate his liability for rent. There was a judgment in the district court of Douglas county in favor of the defendant. There is in the above facts sufficient evidence of a waiver of the technical right to insist upon thirty days' notice of an intention to quit to justify a finding in the district court in favor of the defendant in error, even if that right existed, a point which we do not feel called upon to determine. The judgment of the district court is

AFFIRMED.

EAGLE FIRE COMPANY OF NEW YORK V. GLOBE LOAN & TRUST COMPANY.

FILED APRIL 3, 1895. No. 5973.

1. **Insurance: ADDITIONAL INSURANCE: WAIVER OF TERMS OF POLICY.** An insurance contract provided: "This policy, unless otherwise provided by agreement indorsed hereon, shall be void if the insured shall hereafter procure any other insurance on the property covered by this policy." The insured procured additional insurance on the insured property. In a suit upon the first policy the first insurer interposed the defense that the policy was not in force at the date of the loss because the insured had procured additional insurance contrary to the above provision of the policy. The insured admitted the procuring of the additional insurance, but pleaded in avoidance of the defense that the insurance company had waived its right to forfeit the policy by reason thereof in this: (1) That the insurance company knew of the additional insurance prior to the loss, and by neglecting to cancel the policy in suit, by reason thereof it thereby waived its right to forfeit the policy and elected to carry the risk notwithstanding the additional insurance; (2) that after the loss occurred the insurer, with full knowledge of the additional insurance, submitted the amount of the loss sustained by the insured to arbitration, the insured and insurer paying the expenses thereof; (3) that after the arbitration the insurer canceled the policy, the cancellation taking effect from and after the day of the date of the loss, and repaid to the insured the unearned premium for carrying the risk from the day after the date of the loss until the expiration of the policy by its terms. *Held*, (1) That the provision in the insurance policy prohibiting additional insurance on the insured property was inserted therein for the benefit of, and might be waived by, the insurer; (2) that the violation of the policy by the insured in procuring additional insurance on the insured property without the knowledge or consent of the first insurer did not render the policy issued by it void, but voidable only at the election of such first insurer (*Hughes v. Ins. Co. of North America*, 40 Neb., 626, followed); (3) that the evidence set out in the opinion does not establish that the insurance company knew of the additional insurance prior to the date of the loss sued for; (4) that the conduct of the insurance company after the loss, and with actual knowledge of the additional insurance, in submitting the amount of the

44	380
50	387
54	631
54	742
155	264
55	543

44	380
57	626
57	627

44	380
58	490
58	492
158	493

44	380
159	501

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loss to arbitration and in cancelling the policy and repaying the unearned premium, sustains the finding of the jury that the insurance company by such conduct elected to and did waive its right to cancel the policy by reason of such additional insurance.

—: **KNOWLEDGE OF AGENT.** Knowledge on the part of the agent of an insurance company authorized to issue its policies, of facts which render the contract voidable at the insurer's option, is knowledge of the company. *Gans v. St. Paul & Marine Ins. Co.*, 43 Wis., 108, followed. *German Ins. Co. v. Heiduk*, 30 Neb., 288, distinguished.

—: **NOTICE OF ADDITIONAL INSURANCE.** The statement of an insured to the agent of the insurance company carrying the risk that the former intends to take out additional insurance on the insured property is not notice to such agent or his principal of the existence of such additional insurance when taken out by the insured.

Review: ASSIGNMENT OF ERROR. An assignment of error in this court that the district court erred in admitting the evidence of a certain witness will be overruled if any of the evidence given by the witness was competent.

ERROR from the district court of Douglas county. Tried below before DOANE, J.

The opinion contains a statement of the case.

Jacob Fawcett, for plaintiff in error:

Where a policy of insurance contains a stipulation that if the assured shall have or shall subsequently obtain additional insurance upon property insured, without the consent of the company indorsed in writing on the policy, the same shall be void, said stipulation is material, and lawful, and will be upheld. (*Herman Ins. Co. v. Heiduk*, 30 Neb., 288; *Zinck v. Phoenix Ins. Co.*, 60 Ia., 266; *Sugg v. Hartford Fire Ins. Co.*, 98 N. Car., 143; *Phoenix Ins. Co. v. Lamar*, 106 Ind., 513; *Continental Ins. Co. v. Hulman*, 92 Ill., 145; *Phoenix Ins. Co. v. Michigan S. & N. I. R. Co.*, 28 O. St., 69.)

Where the policy provides that its conditions shall only

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be waived by the written or printed consent of the Company indorsed upon the policy, the local agent cannot bind the company by an oral waiver of such conditions. (*German Ins. Co. v. Heiduk*, 30 Neb., 288; *Kroeger v. Birmingham Fire Ins. Co.*, 83 Pa. St., 264; *Beebe v. Equitable Mutual Life & Endowment Association*, 40 N. W. Rep. [Ia.], 122; *Walsh v. Hartford Fire Ins. Co.*, 7 Ins. L. J. [N. Y.], 423; *Smith v. Niagara Fire Ins. Co.*, 15 Atl. Rep. [Vt.], 353; *Enos v. Sun Ins. Co.*, 8 Pac. Rep. [Cal.], 379; *Catoir v. American Life Ins. & Trust Co.*, 33 N. J. Law, 492; *Weidert v. State Ins. Co.*, 19 Ore., 261; *Messelback v. Sun Fire Ins. Co.*, 26 N. E. Rep. [N. Y.], 34; *Gould v. Dwelling House Ins. Co.*, 51 N. W. Rep. [Mich.], 455; *Direks v. German Ins. Co.*, 34 Mo. App., 44.)

An insurance company, as well as an individual, may limit and restrict the powers of its agent. When such restriction is known to the person dealing with the agent, the company is only bound by the acts of the agent performed within the scope of the authority conferred. (*German Ins. Co. v. Heiduk*, 30 Neb., 288.)

And the holder of the policy is estopped, by accepting the policy, from setting up or relying upon powers of the agent in opposition to the limitations and restrictions in the policy. (*Weidert v. State Ins. Co.*, 19 Ore., 261; *Smith v. Niagara Fire Ins. Co.*, 15 Atl. Rep. [Vt.], 353; *Catoir v. American Life Ins. & Trust Co.*, 33 N. J. Law, 492.)

Where the contract between the parties is that an appraisal for the sole purpose of determining the amount of loss may be had upon request of either party, and that the expenses thereof shall be borne equally, and the agreement to appraise expressly stipulates that such submission shall not be taken as a waiver on the part of the company as to the conditions of the policy, there is no room for claiming a waiver on the part of the company. (*Hill v. London Assurance Corporation*, 9 N. Y. Sup., 502; *Whipple v. North British & Mercantile Fire Ins. Co.*, 11 R. I., 139; *Jewett*

v. *Home Ins. Co.*, 29 Ia., 562; *Johnson v. American Fire Ins. Co.*, 43 N. W. Rep. [Minn.], 59; *Boyd v. Vanderbilt Ins. Co.*, 16 S. W. Rep. [Tenn.], 471; *Englehardt v. Young*, 86 Ala., 535; *Briggs v. Fireman's Ins. Co.*, 65 Mich., 58.)

Where the mortgagee, to secure his interest in the mortgaged premises, takes out a policy of insurance thereon, running to the mortgagor, containing a stipulation against other insurance, the policy is defeated by unauthorized insurance obtained on the property by the mortgagor. (*Hale v. Mechanics Mutual Fire Ins. Co.*, 6 Gray [Mass.], 169; *Grosvenor v. Atlantic Fire Ins. Co.*, 17 N. Y., 391; *State Mutual Fire Ins. Co. v. Roberts*, 31 Pa. Sta., 438; *Pupke v. Resolute Fire Ins. Co.*, 17 Wis. 389; *Lawrence v. Holyoke Ins. Co.*, 11 Allen [Mass.], 387; *Fix v. Illinois Mutual Fire Ins. Co.*, 53 Ill., 151; *Carpenter v. Providence Washington Ins. Co.*, 16 Pet. [U. S.], 495.)

A statement of the insured to the agent of the company that the former intended to obtain additional insurance cannot be made the basis of a waiver of the condition of the policy which requires consent for other insurance to be indorsed on the policy. (*Kroeger v. Birmingham Fire Ins. Co.*, 83 Pa. St., 264; *Beebe v. Equitable Mutual Life & Endowment Association*, 40 N. W. Rep. [Ia.], 122; *Walsh v. Hartford Fire Ins. Co.*, 73 N. Y., 5; *Gladding v. Insurance Associations*, 13 Ins. L. J. [Cal.], 893; *Kyte v. Commercial Assurance Co.*, 10 N. E. Rep. [Mass.], 518; *Lohnes v. Ins. Co. of North America*, 6 Ins. L. J. [Mass.], 472; *Bush v. Westchester Fire Ins. Co.*, 5 Ins. L. J. [N. Y.], 207; *Bowlin v. Hekla Fire Ins. Co.*, 16 Ins. L. J. [Minn.], 305; *Enos v. Sun Ins. Co.*, 8 Pac. Rep. [Cal.], 379; *Catoir v. American Life Ins. Co.*, 33 N. J. Law, 492; *Crane v. City Ins. Co. of Pittsburg*, 2 Flap. [U. S.], 576; *Barnes v. Continental Ins. Co.*, 30 Mo. App., 539; *Dircks v. German Ins. Co.*, 34 Mo. App., 44; *Weidert v. State Ins. Co.*, 19 Ore., 261; *Messelbach v. Sun Fire Ins. Co.*, 26 N. E. Rep.

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[N. Y.], 34; *Gould v. Dwelling House Ins. Co.*, 51 N. W. Rep. [Mich.], 455; *Cleaver v. Traders Ins. Co.*, 65 Mich., 527; *Marvin v. Universal Life Ins. Co.*, 85 N. Y., 278; *Forbes v. Agawam Mutual Fire Ins. Co.*, 9 Cush. [Mass.], 470; *Worcester Bank v. Hartford Fire Ins. Co.*, 11 Cush. [Mass.], 265; *Hale v. Mechanics Mutual Fire Ins. Co.*, 6 Gray [Mass.], 169; *Smith v. Niagara Fire Ins. Co.*, 15 Atl. Rep. [Vt.], 353; *Loring v. Manufacturers Ins. Co.*, 8 Gray [Mass.], 28; *Grosvenor v. Atlantic Fire Ins. Co.*, 17 N. Y., 391; *State Mutual Fire Ins. Co. v. Roberts*, 31 Pa. St., 438; *Pupke v. Resolute Fire Ins. Co.*, 17 Wis., 389; *Lawrence v. Holyoke Ins. Co.*, 11 Allen [Mass.], 387; *Chishom v. Provincial Ins. Co.*, 20 U. C. C. P., 11; *Fix v. Illinois Mutual Fire Ins. Co.*, 53 Ill., 151; *Carpenter v. Providence Washington Ins. Co.*, 16 Pet. [U. S.], 495; *Buffalo Steam Engine Works v. Sun Mutual Ins. Co.*, 17 N. Y., 401; *Gillett v. Liverpool, L. & G. Ins. Co.*, 41 N. W. Rep. [Wis.], 78.)

Frank T. Ransom and Howard B. Smith, contra:

The insurance company waived the forfeiture after it learned of the loss, and after it had full knowledge of all the facts as to the loss and additional insurance. (1 Wood, Fire Insurance, p. 286, sec. 109; *Ins. Co. of North America v. McLimans*, 28 Neb., 659; *Dwelling House Ins. Co. v. Weikel*, 33 Neb., 668.)

RAGAN, C.

This is a suit brought in the district court of Douglas county against the Eagle Fire Company (hereinafter called the "Insurance Company") upon an ordinary policy of fire insurance issued by the Insurance Company to one Ida W. Brown, insuring certain property of hers against loss or damage by fire from noon of the 13th day of March, 1890, to noon of the 13th day of March 1895. The suit is brought by Henry G. Hubbard, Mrs. Brown's assignee.

Pending the action Hubbard died, and the suit was revived in the name of his executors. The connection of the Globe Loan & Trust Company with the case need not be stated. Hubbard's executors had a verdict and judgment and the Insurance Company has prosecuted to this court a petition in error. In our examination of the case we shall not confine ourselves to a consideration of the errors assigned in the order of their assignment but consider them under the following heads:

1. That the verdict is not sustained by sufficient evidence. The policy sued upon contains this provision: "This entire policy, unless otherwise provided by agreement indorsed hereon or added hereto, shall be void if the insured now has or shall hereafter make or procure any other contract of insurance, whether valid or not, on property covered in whole or in part by this policy." As a defense to the action the Insurance Company pleaded that after the issuance of the policy in suit, and without its consent indorsed in writing on the policy, Mrs. Brown procured additional insurance on the insured property. Hubbard's executors by their reply to this defense admitted that Mrs. Brown procured additional insurance on the insured property without the consent of the Insurance Company having been first indorsed in writing on the policy in suit, but pleaded in avoidance of the defense that the company had waived Mrs. Brown's violation of the policy in that respect in this: That prior to the loss the company had notice of the procuring of such additional insurance and failed to exercise its right to cancel the policy by reason of such additional insurance and thereby elected to carry the risk notwithstanding such additional insurance; that after the loss occurred the Insurance Company, with full knowledge of the existence of the additional insurance in pursuance of an agreement with Mrs. Brown, submitted the amount of the loss or damage sustained by Mrs. Brown by reason of the destruction of the insured

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property by fire to arbitration, the insured and the insurer paying the expenses of such arbitration; that the loss occurred on the 9th day of November, 1890, and on the 24th of November, 1890, after arbitration of the amount of the loss, the company elected to and did cancel its policy, such cancellation taking effect only from and after the day of the date of the loss, and repaid to the insured the unearned premium for carrying the risk from the day after the date of the loss until the expiration of the policy by its terms.

The evidence is undisputed that the company canceled the policy on the 24th of November, 1890, and repaid to Mrs. Brown the unearned premium and took from her a receipt of that date in words and figures as follows: "Received of the Eagle Fire Company twenty-nine dollars, return premium on policy number 474, in consideration of which said policy is canceled. Said cancellation dates from November 9th, 1890, subject however to claim for loss up to and including November 9th, 1890." The evidence is also undisputed that after the loss had occurred that the Insurance Company, with knowledge of the fact that Mrs. Brown had procured additional insurance upon the property subsequent to the date of the policy in suit, submitted the amount of the loss or damage to the insured property to arbitration. The evidence as to the knowledge or notice which the Insurance Company had of the additional insurance prior to the loss is contained in the following testimony given by Brown, the husband of the insured:

Q. After * * * this insurance had been taken out that is being sued on here did you visit Ringwalt Bros., agents for the Eagle Company, for the purpose of taking out further insurance?

A. I did; yes, sir.

Q. Who did you find in the office?

A. Mr. Ringwalt, the same that is sitting right near the desk in the court room.

Q. At the present time?

A. Yes, sir.

Q. What transpired between you and Mr. Ringwalt?

A. I told Mr. Ringwalt that I was going to take out some more insurance. I asked him to give me a list of the insurance, as Mr. Devries had changed the amount of the policies. I was not sure about the amount. He said all right, and he went and got some large book from a book-case and he put it down with a lead pencil.

Q. Who put it down?

A. Mr. Ringwalt put down the amount of the insurance and the name of the company and handed that to me.

Q. Look at the paper I hand you now and state whether that is the memorandum Mr. Ringwalt made and handed you at the time you are speaking of?

A. That is the memorandum.

Q. When did you first speak to Mr. Ringwalt after that about additional insurance and when did he first learn about it to your knowledge, about the additional insurance?

A. After the time I got this paper from him?

Q. Yes.

A. Why, on the morning of the 10th, I think it was, of November. That was the day after the fire on Monday morning.

Q. Where did you see him?

A. Out there at the house.

Q. What was said there about additional insurance?

A. He wanted to know if I had that insurance written I was speaking about, and I told him "Yes." He said, have I notified those companies. He wanted to know if they had been out there, and I said, "No, not so far."

Q. Was anything said about the amount of additional insurance?

A. Yes, I told him the amount.

Q. Was anything further said about it?

A. No, sir; Mr. Ringwalt seemed to be in a hurry. He didn't stop there more than ten minutes probably all together.

What is the effect of this evidence? We think that the evidence of Brown amounts to this: (1.) That about the 5th of November, prior to the destruction of the property by fire, Mr. Brown, husband and agent of the insured, went to the agents of the Insurance Company, asked them for certain information, and told them that he intended to place additional insurance upon the insured property; but we do not think that this evidence shows, nor that the jury would have been justified in inferring from it, that the Insurance Company, or its agents, knew at any time before the loss made the subject of this suit that Mrs. Brown had procured additional insurance upon the insured property. (2.) That the conduct of the Insurance Company after the loss, in submitting the amount of the loss or damage sustained by Mrs. Brown by reason of the destruction of the insured property by fire to arbitration, was evidence which tended to show that the Insurance Company at that time, having knowledge of the existence of the additional insurance, had elected to waive a cancellation of the policy on account of such additional insurance. It is true that the contract between the insured and the insurer under which this arbitration took place provided that the arbitration should not be construed as a waiver of any of the rights or defenses of either party, nor as either an admission or denial of liability on the part of the Insurance Company; but this only meant that the arbitration should not be conclusive evidence of a waiver on the part of the Insurance Company of any legal defense it might have to a suit upon the policy. The arbitration, then, while not conclusive evidence, was we think competent evidence for the jury to consider in determining whether or not the Insurance Company waived the violation of the policy by Mrs. Brown in taking out additional insurance. (3.) That the act of the

Insurance Company in canceling the policy on the 24th of November, 1890, and repaying to Mrs. Brown the unearned premium to which the Insurance Company would have been entitled for carrying the risk from the 10th of November, 1890, until noon of the 13th of March, 1895, both dates inclusive, was evidence which tended very strongly to show that the Insurance Company at that time recognized the policy as being in force up to and including the day that the loss sued for occurred. Whether the Insurance Company waived the provision in the policy which made it voidable at the election of the Insurance Company in case the insured should procure additional insurance without the consent of the company thereto having been first indorsed on the policy was a question of fact for the jury, and this question of fact was to be found one way or the other by the jury from the facts and circumstances in evidence in the case which went to show the intention of the Insurance Company in the premises. If the Insurance Company did not intend to and had not waived its right to cancel the policy by reason of Mrs. Brown's procuring additional insurance, it is very difficult to understand its conduct in going to the expense of having the amount of the loss or damage sustained by Mrs. Brown determined by arbitration; and it is still more difficult to understand why the Insurance Company paid her the unearned premium from the 10th day of November, 1890, to the expiration of the policy by its terms. Mrs. Brown having violated the policy by procuring additional insurance thereon without the knowledge or consent of the insurer, it was entitled on discovering such violation to cancel the policy by reason thereof, such cancellation to take effect from and after the date of its violation. But the Insurance Company did not do this. By its own act it canceled the policy on the 24th of November, the cancellation to take effect on and after the 10th day of November, the day after the date of the loss. The evidence then on which this verdict rests is not very satis-

. It is slight; but we are constrained to say we think it is sufficient.

That the judgment is contrary to the law of the case. The argument under this contention is that the notice given to the insured to the insurance company's agents of his intention to procure additional insurance on the insured property was not notice to the company. In other words, notice to an agent is not notice to his principal. In view of what we have already said as to the effect of the decision of Brown, we might dispense with any further discussion of this evidence, and would do so but for the fact that counsel seems to misapprehend the decision of this court in *German Ins. Co. v. Heiduk*, 30 Neb., 288. In that case the defense was the same as it is here—additional insurance without the knowledge or consent of the insurer, and the reply that the insurance company had waived the condition of the policy in that respect, in this, that the local agent of the insurance company orally consented to such additional insurance. The policy provided: "No consent or agreement by any local agent should affect any condition of the policy until such consent or agreement is indorsed on," and the court held, the present chief justice, notwithstanding the opinion, that the oral consent of the local agent to taking out the additional insurance was not binding on the company. But that case does not hold, nor does the present case in this court hold, that a notice given to an authorized and acting agent of a principal about a matter within the scope of such agent's authority is not notice to the principal. In the case at bar it is not claimed that the agent of the insurance company consented that the insured might procure additional insurance upon the property. The claim made is—though, as we have seen, the court does not sustain it—that the insured notified the company that he had taken out additional insurance upon the insured property, and that such notice to the agent was also notice to the principal. Without a doubt the conclusion

contended for would be correct if the evidence established the fact that the insured did give the insurance company's agent notice that additional insurance had been procured upon the property. It would seem unnecessary to cite an authority in support of this rule. Insurance companies for the most part are corporations. They act and can only act through agents. Some of the insurance companies doing business in this state hold charters from the parliament of Great Britain; their domicile is in England. It will not do to say that a notice, to be effective and binding upon such a company, must be served by the insured on the company at its home office in London or Liverpool. Again, it is to be remembered that the violation of this provision by the assured in procuring additional insurance on the property without the knowledge or consent of the first insurer did not render the policy issued by it void, but voidable at the election of such first insurer; that this provision was inserted in the insurance contract for the benefit of, and might be waived by, the insurer. (*Hughes v. Ins. Co. of North America*, 40 Neb., 626.) The evidence in this record shows that Ringwalt Bros. were the agents of this insurance company at the time the policy in suit was issued, and that they continued to be the agents of this company, so far as this record shows, until the present time; and that they had authority not only to issue but to cancel policies when in their judgment it was for the interest of their principals to do so.

In *Phenix Ins. Co. v. Covey*, 41 Neb., 724, this court said: "Where an insurance agent, with authority to receive premiums and issue policies, exercises such authority with knowledge of the existence of concurrent insurance on the premises, the company is estopped, after a loss, to insist that the policy is void because consent to such concurrent insurance was not given in writing." In other words, the case last cited holds that the knowledge of the insurance company's agent of the existence of insurance on the property

on which he issued the policy was the knowledge of the insurance company. This rule is supported by the overwhelming weight of authority.

In *Gans v. St. Paul Fire & Marine Ins. Co.*, 43 Wis., 108, it was held: "Knowledge on the part of the agent of an insurance company, authorized to issue its policies, of facts which render the contract voidable at the insurer's option is knowledge of the company."

In *Bennett v. Council Bluffs Ins. Co.*, 31 N. W. Rep., 948, the supreme court of Iowa said: "Where the clerk of a duly appointed agent of a fire insurance company solicits insurance on property which he knows to be insured already in another company, and his employer, the agent, issues the policy upon the application so obtained, the insurance company is bound by the knowledge of the clerk."

In *McEwen v. Montgomery County Mutual Ins. Co.*, 5 Hill [N. Y.], 101, it is said: "Notice given to an agent relating to business which he is authorized to transact, and while actually engaged in transacting it, will in general enure as notice to the principal." (See, also, *American Ins. Co. v. Gallatin*, 3 N. W. Rep. [Wis.], 772; *Matlocks v. Des Moines Ins. Co.*, 37 N. W. Rep. [Ia.], 174.)

3. Another assignment of error here is that the court erred in admitting the evidence of the witness Brown, the husband and agent of the insured. We cannot review this assignment of error. Brown's testimony covers several pages of the bill of exceptions, and the petition in error does not specifically point out any particular part of his evidence which it is alleged the court erred in permitting to go to the jury; nor does it appear from the bill of exceptions that any exception was taken to the rulings of the court in permitting Brown to give the testimony which we have quoted above. An assignment of error in this court that the district court erred in admitting the evidence of a certain witness will be overruled if any of the evidence given by the witness was competent.

4. Another error assigned is "That the court erred in giving instructions numbered 1, 2, 3, and 4, given by the court upon its own motion." The first of these instructions is in the following language: "That the terms contained in the policy of insurance which has been introduced in evidence, providing for a forfeiture of the policy under certain conditions, were inserted therein for the benefit of the defendant company, and such forfeiture may be waived by the company if it chooses so to do." Certainly the court did not err in giving this instruction; and as the assignment is that the court erred in giving all of the instructions named, it must be overruled.

5. Another assignment of error is that the court erred in modifying instructions numbered one and three asked by the Insurance Company. The third of these instructions was in the following language: "You are further instructed that it appears from the evidence that one Mr. Butler, whom the evidence shows to have been an independent adjuster, residing in St. Louis, Missouri, came here and represented the defendant in the adjustment and appraisal, but there is no evidence as to what authority, if any he possessed, and the law will presume that his power extended co-extensive with the business entrusted to him, namely, the ascertaining the amount of the loss; but it will not be presumed that he had power to alter the contract between the parties, or to waive any of its conditions, these not being within the apparent scope of his authority." And the modification complained of was the addition by the court at the end of the instruction of the following words: "But such want of authority in the adjuster, if there was such want of authority, would in no way affect the authority of other officers and agents of the company to waive the conditions of the policy." The court did not err in modifying this instruction.

6. The final assignment of error is that the court erred in refusing to give instructions 2, 4, and 5, asked by the

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Insurance Company. The fourth of these instructions is in the following language: "You are instructed that so far as the evidence discloses in this case the Ringwalt Bros. were the agents of the defendant company who issued the policy and collected the premium, but when that was done, so far as the evidence shows in this case, their authority ceased and determined, and the defendant is not bound by any knowledge which came to them affecting the validity of the policy subsequent thereto, unless it be shown that the same was communicated to the company; and as to such knowledge or information as may have come to their knowledge, or to the knowledge of either of them, and as to which there is no evidence to show the same was communicated to the company, the company is not bound, the burden being upon the plaintiff to show that such information or communication was delivered to the company." The court did not err in refusing to give this instruction; and since the assignment is that it erred in refusing to give all the instructions named, the assignment must be overruled. By this instruction the Insurance Company requested the court to tell the jury that after Ringwalt Bros., the Insurance Company's agents, had issued the policy in suit that their authority as agents of the Insurance Company ceased. This would have been wrong. The evidence in the record shows that they were not only agents of the company at the time they issued the policy in suit, but that they were agents of the company at the time the loss occurred, at the time the arbitration of the loss took place, at the time the policy in suit was canceled, and at the time of the trial of this action; and that they had authority not only to issue policies, but to cancel them. The agent of the Insurance Company said on the witness stand in this case that had he known of the existence of the additional insurance prior to the occurrence of the loss that he would have canceled the policy of Mrs. Brown. But this instruction was bad for another reason. By it the Insurance Company requested

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the court to charge the jury as a matter of law that the Insurance Company was not bound by any knowledge affecting the validity of the policy which came to the Insurance Company's agents unless such knowledge was communicated to the Insurance Company. We have already seen this is not the law.

There is no error in the record and the judgment of the district court is

AFFIRMED.

**GERMAN INSURANCE & SAVINGS INSTITUTION V.
JACOB KLINE.**

FILED APRIL 3, 1895. No. 6063.

1. **Insurance: NOTICE AND PROOF OF LOSS: WAIVER.** Notice and proofs of loss are waived when an insurance company denies liability on the ground that its policy was not in force when the loss occurred.
2. **—: VALIDITY OF POLICY: APPLICATION: WAIVER.** When an insurance company issues its policy and accepts and retains the premium without requiring an application by the insured and without making inquiry as to the condition of the property or the state of its title, and the insured has in fact an insurable interest, the company will be conclusively presumed to have insured such interest and to have waived all provisions in the policy providing for its forfeiture by reason of any facts or circumstances affecting the condition or title of the property in regard to which no such statement was required or inquiry made.

ERROR from the district court of Douglas county. Tried below before KEYSOR, J.

The facts are stated by the commissioner.

Bartlett, Crane & Baldrige, for plaintiff in error:

Denial of liability after expiration of time for furnish-

44	395
45	500
44	395
48	753
44	395
49	820
53	814
53	821
54	308
55	130
44	395
62	801

ing proofs of loss is not a waiver of the proofs. (Wood, Fire Insurance, p. 725; *Metropolitan Safety Fund Accident Association v. Windover*, 27 N. E. Rep. [Ill.], 538; *Van Kirk v. Citizens Ins. Co.*, 48 N. W. Rep. [Wis.], 798.)

The provision of the policy to furnish proofs of loss as soon as possible was not complied with. The right to furnish and keep alive a claim of recovery required this to be done in a few days. (*Trask v. State Fire & Marine Ins. Co.*, 29 Pa. St., 198; *Roper v. Lender*, 1 El. & El. [Eng.], 825; *McEvers v. Lawrence*, 1 Hoff. Ch. [N. Y.], 172; *Inman v. Western Fire Ins. Co.*, 12 Wend. [N. Y.], 452; *Cornell v. Milwaukee Mutual Fire Ins. Co.*, 18 Wis., 407; *Whitehurst v. North Carolina Mutual Ins. Co.*, 7 Jones Law [N. Car.], 433; *Quinlan v. Providence Washington Ins. Co.*, 31 N. E. Rep. [N. Y.], 32.)

The company is not liable. It had no notice that the insured building was situated on leased ground. Knowledge of the agent was not notice to the company. (*East Texas Fire Ins. Co. v. Brown*, 18 S. W. Rep. [Tex.], 713; Ostrander, Fire Insurance, p. 108, and citations; *Pottsville Mutual Ins. Co. v. Minnequa Springs Improvement Co.*, 100 Pa. St., 137; *Liverpool, London & Globe Ins. Co. v. Sorsby*, 60 Miss., 302; *Forest City Ins. Co. v. School Directors*, 4 Ill. App., 145; *Queen Ins. Co. of Liverpool v. Young*, 5 So. Rep. [Ala.], 116; *American Ins. Co. v. Luttrell*, 89 Ill., 314; *Jordan v. State Ins. Co.*, 64 Ia., 216; *Donnelly v. Cedar Rapids Ins. Co.*, 70 Ia., 693; *Mullin v. Vermont Mutual Fire Ins. Co.*, 58 Vt., 113; *Mers v. Franklin Ins. Co.*, 68 Mo., 127.)

Charles Offutt, contra:

The company's denial of all liability was a waiver of proofs of loss. (*Brink v. Hanover Ins. Co.*, 80 N. Y., 112; *Goodwin v. Massachusetts Mutual Life Ins. Co.*, 73 N. Y., 480; *Grattan v. Metropolitan Life Ins. Co.* 80 N. Y., 289;

Mosely v. Vermont Mutual Fire Ins. Co., 55 Vt., 146; *Marston v. Massachusetts Life Ins. Co.*, 59 N. H., 94; *Kansas Protective Union v. Whitt*, 36 Kan., 760; *State Ins. Co. v. Maackens*, 38 N. J. Law, 569; *Lebanon Mutual Ins. Co. v. Erb*, 4 Atl. Rep. [Pa.], 8.)

Where there is no exact limit for furnishing proofs of loss, the policy should be construed as requiring their production within a reasonable time. (*Brink v. Hanover Ins. Co.*, 80 N. Y., 112; *Hoose v. Prescott Ins. Co.*, 23 Ins. L. J. [Pa.], 475; *Continental Ins. Co. v. Lippold*, 3 Neb., 391; *Killips v. Putnam Fire Ins. Co.*, 28 Wis., 472; *Columbia Ins. Co. v. Lawrence*, 10 Pet. [U. S.], 507.)

The company cannot claim a forfeiture on the ground that the building stood on leased land. There was no written application and no concealment by the insured of the true state of the title. The company was bound by the knowledge of its agent. (*Bardwell v. Conway Mutual Fire Ins. Co.*, 122 Mass., 90; *Armenia Ins. Co. v. Paul*, 91 Pa. St., 520; *O'Neill v. Ottawa Agricultural Ins. Co.*, 30 U. C. C. P., 151; *Dodge County Mutual Ins. Co. v. Rogers*, 12 Wis., 374; *Tiefenthal v. Citizens Mutual Fire Ins. Co.*, 53 Mich., 306; *Carson v. Jersey City Fire Ins. Co.*, 43 N. J. Law, 300; *Jersey City Fire Ins. Co. v. Carson*, 44 N. J. Law, 210; *John Hancock Mutual Life Ins. Co. v. Daly*, 65 Ind., 6; *Cross v. National Fire Ins. Co.*, 132 N. Y., 133; *Wood v. American Fire Ins. Co.*, 29 N. Y. Sup., 252; *Phoenix Life Ins. Co. v. Raddin*, 120 U. S., 183; *Dunbar v. Phenix Ins. Co.*, 72 Wis., 492; *Lorillard Fire Ins. Co. v. McCulloch*, 21 O. St., 179; *Dayton Ins. Co. v. Kelly*, 24 O. St., 345; *Philadelphia Tool Co. v. British-American Assurance Co.*, 20 Ins. L. J. [Pa.], 566; *O'Brien v. Ohio Ins. Co.*, 13 Ins. L. J. [Mich.], 825; *Van Kirk v. Citizens Ins. Co. of Pittsburg*, 48 N. W. Rep. [Wis.], 798; *Peet v. Dakota Fire & Marine Ins. Co.*, 47 N. W. Rep. [So. Dak.], 532; *Wytheville Ins. & Banking Co. v. Stultz*, 20 Ins. L. J. [Va.], 481; *Castner v. Farmers Mutual Fire*

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Ins. Co., 46 Mich., 15; *Alkan v. New Hampshire Ins. Co.*, 53 Wis., 137; *Dwelling House Ins. Co. v. Hoffman*, 18 Atl. Rep. [Pa.], 397; *Gristock v. Royal Ins. Co.*, 49 N. W. Rep. [Mich.], 634; *Morrison v. Tennessee Mutual & Fire Ins. Co.*, 18 Mo., 262; *Hall v. Niagara Fire Ins. Co.*, 53 N. W. Rep. [Mich.], 727; *Hoose v. Prescott Ins. Co. of Boston*, 84 Mich., 309; *German Ins. Co. v. Rounds*, 35 Neb., 752; *Bennett v. Council Bluffs Ins. Co.*, 70 Ia., 600; *State Ins. Co. v. Jordan*, 29 Neb., 514; *Boetcher v. Hawk-eye Ins. Co.*, 47 Ia., 253; *McArthur v. Home Life Association*, 73 Ia., 336; *Indiana Ins. Co. v. Hartwell*, 19 Ins. L. J. [Ind.], 824.)

IRVINE, C.

This was an action by Kline against the insurance company to recover upon a policy of insurance written on a frame building in the city of Omaha, the building having been destroyed by fire. The insurance company answered, admitting the payment of the premium and the issuance of the policy, but denying that plaintiff was the owner of the building. Further answering, the defendant alleged that the policy provided that "if the interest of the assured in the property be any other than the entire, unconditional, and sole ownership of the property for the use and benefit of the assured, or if the building insured stands on leased ground, it must be so represented to the company and so expressed in the written part of this policy, otherwise this policy shall be void;" that the building did stand upon leased ground, and that this fact was not communicated to the defendant. Two other defenses were pleaded of an affirmative character, in support of which it was not sought to introduce any evidence. They will not, therefore, be noticed. The defense was actually made on two grounds: First, that notice and proofs of loss were not furnished; and second, that the building stood on leased ground, contrary to the terms of the policy. At the close of the

evidence the court instructed the jury that the only question for their consideration was the amount of damage, and that they should return a verdict for the plaintiff for such amount.

After the loss the company wrote to plaintiff's attorney a letter stating that the company denied all liability because the policy was void according to its conditions at the time of the fire. In its answer it pleaded that for three different reasons the policy was so void. Notice and proofs of loss are waived when an insurance company denies liability on the ground that the policy was not in force when the loss occurred. (*Phenix Ins. Co. v. Bachelder*, 32 Neb., 490; *Omaha Fire Ins. Co. v. Dierks*, 43 Neb., 475; *Dwelling House Ins. Co. v. Brewster*, 43 Neb., 528.)

As to the defense based upon the title to the land, the evidence showed that the policy contained the provision set out in the answer; that the building belonged to the plaintiff, and that it stood on leased land. It appears that the Omaha agents of the company were Kneutsen, Smith & Co., and that they had in their employ one Miller, who solicited insurance for them and received a commission on policies written. Miller approached the plaintiff, requesting insurance, and was told to return some days later and it would be given him. Plaintiff told Miller that the building stood on leased ground. Miller filled out a printed blank stating certain facts in connection with the risk, but containing no reference to title. This he delivered to Kneutsen, Smith & Co., who issued the policy. The insurance company claims that Miller was not the agent of the company and that plaintiff's statement to him in regard to the title did not charge the company with notice, and that therefore the provision of the policy avoiding it because of the building's being on leased ground was enforceable. It is not necessary to decide what the nature of Miller's agency was. If of such a character as to charge the company with notice,

then the facts in regard to the title were truly disclosed and the company issued the policy and received and retained the premium with such notice. This fact would estop the company from now insisting that the policy was void because of the lease-hold clause. (*Phenix Ins. Co. v. Covey*, 41 Neb., 724; *German-American Ins. Co. v. Hart*, 43 Neb., 441.) On the other hand, if Miller was not the agent of the company, then the policy was issued without any inquiry in regard to title. In any event it was issued without requiring any formal application, and there was certainly no concealment or misrepresentation by plaintiff. When an insurance company issues its policy and accepts and retains the premium without requiring an application by the insured, and without making any inquiry as to the condition of the property or the state of the title, and the insured has in fact an insurable interest, the company will be conclusively presumed to have insured such interest and to have waived all provisions in the policy providing for its forfeiture by reason of any facts or circumstances affecting the condition or title of the property in regard to which no such statement was required or inquiry made. The real contract of insurance is made before the policy is written, and the insured, by accepting the policy with such a condition as the one relied upon, cannot be deemed to have represented his title to be in fee-simple, or not by lease-hold. How can it be said that under such circumstances there has been either fraud, misrepresentation, or concealment on the part of the insured? He has represented nothing. He has not been asked to represent anything. To give such a condition the force contended for would, instead of protecting the insurance company from fraud, be to permit it to work a fraud upon a policy holder, and permit insurance companies to avoid their policies all the more readily because of neglecting inquiry and investigation before writing them. On this point, as on most points of insurance law, the authorities are not alto-

gether harmonious, but we think their great weight is in accordance with the views we have expressed. (*Philadelphia Tool Co. v. British-American Assurance Co.*, 132 Pa. St., 236; *Commonwealth v. Hide & Leather Ins. Co.*, 112 Mass., 136; *Castner v. Farmers Mutual Fire Ins. Co.*, 46 Mich., 15; *O'Brien v. Ohio Ins. Co.*, 52 Mich., 131; *Western Assurance Co. v. Mason*, 5 Brad. [Ill.], 141; *Dunbar v. Phenix Ins. Co.*, 72 Wis., 492; *Cross v. National Fire Ins. Co.*, 132 N. Y., 133.) It is in accordance with the same principle that the courts have held with practical uniformity that where a formal application is required and some questions are left unanswered or not fully answered, and the company accepts the application in that form and issues its policy, the company thereby waives the information required by such questions. (*Phoenix Life Ins. Co. v. Raddin*, 120 U. S., 183; *Carson v. Jersey City Ins. Co.*, 43 N. J. Law, 300; *Lorillard Fire Ins. Co. v. McCulloch*, 21 O. St., 176.) There was no contradiction and no conflict in the evidence on any of these points, and it follows that in any view of the case the plaintiff was entitled to judgment. Therefore, the instruction given by the court was correct.

Error is assigned on the refusal of certain instructions asked by the company. None of these related to the measure of damages, and as the peremptory instruction to find for the plaintiff was correct, it was not error to refuse any instruction asked by the defendant in regard to the right to recover.

Numerous assignments of error relate to the rulings upon the evidence. But one of these is referred to in the briefs and the others are deemed waived. The plaintiff, on direct examination, was asked, "Who was the agent with whom you made the transaction when you got this policy?" This was objected to as calling for a conclusion. The objection was overruled and the witness answered, "Mr. Miller." It is claimed that this ruling was particularly prejudicial because a similar question was excluded when asked a wit-

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ness for the defendant. The latter witness was asked whether he knew Miller and then this question was put, "Was he an agent of the German Insurance & Savings Institution at that time?" An objection to this question was sustained. Both rulings were free from error. In the question first quoted, put to the plaintiff, he was not asked for whom Miller was agent. There was no dispute as to Miller's agency either for the company or for the plaintiff in procuring the policy, and the question put to the plaintiff merely asked as to the identity of the person. It involved no question as to his authority or the identity of the principal. The second question put to defendant's witness called for a legal conclusion as to what constituted agency.

The record discloses no error and the judgment is

AFFIRMED.

M. YENNEY ET AL. V. CENTRAL CITY BANK.

FILED APRIL 3, 1895. No. 5939.

1. **Negotiable Instruments: PAYMENT: NOTICE TO TRANSFEREE.** Where a negotiable promissory note has been before maturity indorsed to a third person, the maker of the note must, in order to avail himself of the defense of payment before the indorsement, plead and prove that the plaintiff had notice of such payment before the indorsement.
2. **Bill of Exceptions: DOCUMENTS: AUTHENTICATION.** In order to authenticate a document attached to a record as the bill of exceptions settled in the district court, there must be a certificate of the clerk of the court to that effect.
3. **—: ALLOWANCE BY CLERK.** The mere stipulation of counsel that the clerk of the court may sign and allow a bill of exceptions is not sufficient to confer authority upon him to do so. In order to confer such authority it must appear that the judge is dead; that he is prevented by sickness or absence from signing and allowing the bill, or the parties or their counsel must agree

44	402
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47	164
47	200
47	396
48	163
44	402
53	569
44	402
59	278

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upon the bill of exceptions and attach thereto their written stipulation to that effect. *Scott v. Spencer*, 42 Neb., 632, followed.

ERROR from the district court of Merrick county. Tried below before MARSHALL, J.

J. W. Sparks, for plaintiffs in error.

W. T. Thompson, contra.

IRVINE, C.

The defendant in error sued the plaintiffs in error on a promissory note made by the plaintiffs in error to the order of the Central City Bank, a partnership formerly existing, and which, before the maturity of the note, indorsed it to the defendant in error, a corporation which purchased the assets of the partnership of the same name. The Yenneys answered the petition, pleading that the partnership had held as collateral security to the note three notes of other persons which, prior to the transfer to the corporation, had been paid and their proceeds applied to the satisfaction of the note sued on, and that the corporation had notice of these facts at the time of its purchase. There was a verdict and judgment for the bank and the Yenneys prosecute error.

The first point made on behalf of plaintiffs in error is that under the pleadings they were entitled to judgment. This argument is based upon the proposition that either by the petition or the reply it must be alleged that the bank was an innocent holder before maturity and had actually paid the consideration before notice of the defense. We have before had occasion to advert to the unfortunate distinctions which have been drawn as to the burden of proof of *bona fides* when defenses are pleaded which would be sufficient against the original parties to a negotiable instrument. (*Violet v. Rose*, 39 Neb., 660.) The legislature has, however, freed the present case from difficulty on that

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ground. Chapter 41, section 5, Compiled Statutes, is as follows: "If any such bond, note, or bill of exchange shall be indorsed on or before the day on which the same is made payable, and the indorsee shall institute an action thereon, the defendant may give in evidence at the trial any money actually paid on said bond, note, or bill of exchange before the same was indorsed or assigned to the plaintiff, on proving that the plaintiff had notice of such payment before such indorsement was made and accepted." The statute, therefore, requires as a part of the defense that the defendants establish notice on the part of the plaintiff. The petition alleged an indorsement to the plaintiff for value before maturity. The answer, after pleading the payment, proceeded as follows: "And these defendants allege that the plaintiff had knowledge before the assignment of said note set forth in said petition to it that said Merriam and Persinger held said three notes as collateral security to said note, and the said plaintiff had sufficient knowledge of the above set forth facts to have put it on its guard that these defendants had a full defense to said note; and that the same had been paid. And these defendants deny that said plaintiff is an innocent purchaser of said note before due and for a valuable consideration." The reply was a general denial. The allegation of notice was a material and necessary averment of the answer and the denial in the reply properly joined issue thereon.

Complaint is made of the sixteenth paragraph of the instructions. The only assignment of error in relation thereto is as follows: "The court erred in refusing to give instruction No. 1 asked for on behalf of plaintiffs in error and in giving on his own motion instructions Nos. 10, 11, 14, 15, 16, 20, 21, and 22 of instructions given." No complaint is made in the briefs of any instruction except the sixteenth, and some of those given by the court are too manifestly correct to admit of discussion. This assignment of error must, therefore, fail. (*Hiatt v. Kinkaid*, 40 Neb., 178.)

Complaint is also made of the admission in evidence of certain books of the banking partnership. What purports to be the bill of exceptions was allowed by the clerk of the court apparently under a stipulation of the same character as in *Scott v. Spencer*, 42 Neb., 632. Even this stipulation is not attached to the bill, but appears without any authentication whatever after the transcript of the record. The authority of the clerk to settle the bill does not therefore appear. Furthermore, there is no certificate of the clerk as required by section 587b of the Code of Civil Procedure authenticating the document filed as a bill of exceptions.

In order to leave no misapprehension as to the effect of this opinion, we think it proper to say that we have treated the case on the theory on which it was presented to the district court, and we are not deciding that payments made on collateral notes before the maturity of the note to secure which they are pledged are to be treated as payments upon the principal note before its maturity.

JUDGMENT AFFIRMED.

FRANK E. MOORES ET AL. V. PEYCKE BROTHERS ET AL.

FILED APRIL 4, 1895. No. 5937.

1. **Executions: DISTRIBUTION OF PROCEEDS OF SALE.** Where two or more judgments in favor of different plaintiffs and against the same defendant are entered at the same term of the district court, and executions are issued thereon during the term, or within ten days thereafter, and delivered to the sheriff, although on different days, which are levied upon the debtor's goods and chattels, the money arising from the sale under any or all of such writs, if insufficient to satisfy all the executions, must be apportioned *pro rata* among the several execution creditors.

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2. ———: ———. Where two or more writs of execution against the same debtor are delivered to the officer on the same day, in distributing the fund raised thereon, or upon any one of such writs, each creditor is entitled to a *pro rata* application of the money.
3. ———: ———. In every case not enumerated above the execution first placed in the hands of the officer for service has preference and must be first satisfied.
4. **Judgments: TRANSCRIPTS FROM INFERIOR COURTS.** The filing of the transcript of a judgment of a justice of the peace or county court with, and the docketing of it by, the clerk of the district court do not make it a judgment of the district court.
5. **Executions: DISTRIBUTION OF PROCEEDS OF SALE.** Two executions were issued against H. upon judgments of the district court during the term at which they were entered and placed in the hands of the sheriff, who levied the writs upon the personal property of the debtor, and subsequently, at the same term of said court, several transcripts of judgments recovered against H. before a justice of the peace were filed in the district court, and executions were immediately issued thereon by the clerk and delivered to the officer, which were levied upon the same property subject to the other levies. *Held*, That the money raised on the sale of the property must be first applied *pro rata* to the satisfaction of the writs first delivered to the officer, and next to the payment of the other executions in the order of their priority.

ERROR from the district court of Douglas county. Tried below before FERGUSON, J.

Chas. B. Keller, for plaintiff in error, cited: *Hibbard v. Weil*, 5 Neb., 44; *State v. Hunger*, 17 Neb., 217; *Johnson v. Walker*, 23 Neb., 742; *Lambert v. Paulding*, 18 Johns. [N. Y.], 312; *Marsh v. Lawrence*, 4 Cow. [N. Y.], 461; *Davis v. Scott*, 22 Neb., 154; *Longenocker v. Zeigler*, 1 Watts [Pa.], 252; *Auerbach v. Behnke*, 41 N. W. Rep. [Minn.], 946.

McCabe, Wood & Elmer, contra, cited: *Wilcox v. May*, 19 O., 408; *Clevenger v. Hansen*, 24 Pac. Rep. [Kan.], 61; *Atkins' Appeal*, 58 Pa. St., 86; *Brock v. Hopkins*, 5 Neb.,

231; 2 Herman, Executions, sec. 416; *State v. Hamilton*. 29 Neb., 198; *Craig v. Governor*, 3 Cold. [Tenn.], 244; *Blohme v. Lynch*, 2 S. E. Rep. [S. Car.], 136; *Whitman v. Haines*, 4 N. Y. Sup., 48.

NORVAL, C. J.

This is a proceeding in error to review the order of the district court of Douglas county distributing the moneys arising from the sale of certain personal property upon executions. The facts upon which the order in question was based are as follows: On the 1st day of June, 1892, the Farmers & Merchants Bank of Fremont recovered a judgment by confession in the district court of Douglas county against one O. S. Higgins for the sum of \$500, and on the same day Higgins confessed judgment in the same court in favor of D. M. Steele & Co. for \$360. An execution was issued upon each of these judgments on the date they were rendered and delivered to the sheriff, who levied the writs on that day upon a stock of merchandise belonging to the execution debtor. Two days later Allen Bros. recovered a judgment for the sum of \$137 against Higgins before a justice of the peace of Douglas county, and the justice immediately issued an execution thereon and placed it in the hands of the sheriff, who levied upon the same stock of goods theretofore taken under the writs in favor of the Farmers & Merchants Bank and D. M. Steele & Co., said levy being made subject to said prior executions. No transcript of the judgment in favor of Allen Bros. was ever filed in the district court. On June 3, 1892, judgments were recovered against said Higgins in the justice court of Seymour G. Wilcox, in and for Douglas county, in favor of the following named parties, and for the amounts stated: Peycke Bros., for \$47.70 debt and \$7.70 costs; R. Douglas & Co., in the sum of \$101.30 and \$7.70 costs; and Salmer-Richardson Manufacturing Company, for \$20.88 debt and \$7.70 costs. On the same

day transcripts of the three last described judgments were duly filed in the district court and executions issued thereon by the clerk and delivered to the sheriff, and by him on the same day levied upon the stock of merchandise already mentioned, but in terms subject to the levies made under the three prior executions aforesaid. On June 6, 1892, the following judgments were recovered before the said Justice Wilcox against said Higgins: Pitkin Bros., \$90.84; Farwell & Co., \$23.38; Peycke Candy Company, \$17.25, and Pitkin & Brooks, \$159.11. The costs are not included in the above sums, the costs in each case being \$7.70. Transcripts of last named judgments were filed in the district court on June 11, 1892, and on the same day executions were issued thereon and delivered to the sheriff, who forthwith levied the writs upon the stock of goods above named, subject to the executions issued on June 1 and June 3 respectively. The property levied upon was advertised and sold by the sheriff on June 17, 1892, under the executions in favor of the Farmers & Merchants Bank and D. M. Steele & Co., for \$1,105. The next day the sheriff, after deducting the costs of sale, \$142.40, returned the residue of the proceeds into the district court, paying to Frank E. Moores, the clerk of said court, the sum of \$962.60. On the same day said clerk paid to the Farmers & Merchants Bank \$502.36, being the amount of their judgment and interest, and to D. M. Steele & Co., \$361.99, said sum being the principal of their judgment and interest, and after the payment of the costs in these two cases, amounting to \$16.76, there remained in the hands of the clerk of the district court the sum of \$71.49. The May, 1892, term of the district court in and for Douglas county convened May 9, 1892, and adjourned *sine die* July 30th of the same year. On June 20, 1892, two days after the money had been paid out by the clerk as aforesaid, a motion was filed in the district court in the case of Peycke Bros. v. Higgins, praying a *pro rata* distribution of the moneys

realized from the sale of the property among all the judgment creditors above referred to, excepting Allen Bros. This motion was sustained by the court, and the clerk was ordered to distribute the funds *pro rata* between all of the execution creditors except Allen Bros. To reverse this decision Frank E. Moores, the clerk of the court, and the Farmers & Merchants Bank and D. M. Steele & Co. have prosecuted a petition in error to this court.

Under the foregoing facts the defendants in error contend that no priority or preference between the eight executions issued out of the district court exists, but that the entire fund was properly ordered by the court applied *pro rata* in payment of the eight execution creditors, according to the amount of their respective claims.

On behalf of plaintiffs in error it is urged that, as the money arising from the sale of the property is insufficient to satisfy the several executions, the judgments in favor of D. M. Steele & Co. and the Farmers & Merchants Bank, having been rendered at the same term of court and the executions thereon having been first levied, should be first satisfied in full before any portion of the proceeds of the property should be distributed or appropriated to the judgments subsequently rendered.

The determination of the question depends upon the construction of section 484 of the Code of Civil Procedure, which provides as follows:

“Sec. 484. When two or more writs of execution against the same debtor shall be sued out during the term in which judgment was rendered, or within ten days thereafter, and when two or more writs of execution against the same debtor shall be delivered to the officer on the same day, no preference shall be given to either of such writs; but if a sufficient sum of money be not made to satisfy all executions, the amount made shall be distributed to the several creditors in proportion to the amount of their respective demands. In all other cases the writ of execution first delivered to the

officer shall be first satisfied. And it shall be the duty of the officer to indorse on every writ of execution the time when he received the same, but nothing herein contained shall be so construed as to affect any preferable lien which one or more of the judgments on which execution issued may have on the lands of the judgment debtor."

By the foregoing section, where two or more judgments are recovered at the same term of court against the same debtor, and where there is no priority of lien, and executions are issued thereon during such term, or within ten days thereafter, and placed in the hands of the sheriff, whether on the same or different days, no preference shall be given either of said writs, but if the property levied upon is insufficient to satisfy all the executions, the money realized from the sale must be distributed or appropriated to the several execution creditors in proportion to the amounts of their respective judgments. The legislature, by the section quoted, has further provided that "in all other cases the writ of execution first delivered to the officer shall be first satisfied." In other words, in all cases where executions are not issued during the term at which the judgments are entered, or within ten days after the term, as well as where the writs are received by the officer on different days, the proceeds of the sale of the property must be first applied in satisfaction of the execution first delivered to the officer, and so in the order of their priority. By the last clause of the section provision is made saving the rights of preferable lien-holders, but this limitation, or proviso, applies alone to lands within the county upon which the judgment is a lien, and not to lands out of the county where the judgments were rendered, nor to goods and chattels, for upon neither of which does a judgment operate as a lien.

Section 484 was under consideration in *Hibbard v. Weil*, 5 Neb., 41, and Mr. Justice GANTT, in delivering the opinion of the court, after quoting the section mentioned,

uses this language: "The above seems to be the only cases in which the statute authorizes the apportionment of money arising from the sale of a debtor's land on execution *pro rata* to judgment creditors. The one is where two or more executions against the same debtor shall be issued during the term at which the judgments were rendered, or within ten days thereafter; the other when two or more executions against the same debtor are issued and placed in the hands of the officer on the same day."

State v. Hunger, 17 Neb., 216, was where several executions issued by a justice of the peace were delivered to the officer on the same day, and it was held that the provisions of section 484 were applicable to executions issued by justice courts, and that the money realized from the sale of the property levied upon must be distributed *pro rata* among the several judgment creditors.

In the case under consideration, the judgments of D. M. Steele & Co. and the Farmers & Merchants Bank were entered at the same term of court and on the same day, and executions were issued thereon during the term and placed in the hands of the sheriff at the same time. All the other judgments were subsequently rendered in the justice court and, with the exception of the one in favor of Allen Bros., were transcribed to the district court and executions issued thereon by the clerk thereof at the same term of court the judgments in favor of the Farmers & Merchants Bank and D. M. Steele & Co. were obtained. Does the fact that transcripts of the judgments were filed in the district court and executions were issued therefrom and delivered to the sheriff at the same term the two judgments were procured authorize the applying of the proceeds of the sale in question *pro rata* upon all the executions issued out of the district court? It is obvious that the question must be answered in the negative, unless the judgments, of which transcripts were filed and entered upon the execution docket, stand upon the same footing with the judgments rendered

in the district court. We do not think such is the case. The purpose of the legislature in enacting the section of the statute we have been considering was to provide that there should be no preference in cases where two or more executions are sued out of the same court in term time or within a specified number of days thereafter on judgments rendered at the same term against the same defendant, and when there is no priority of lien. Section 561 of the Code provides for the filing of transcripts of judgments rendered by justices of the peace in the district court of the county in which the judgments were recovered. The next section makes such judgment so transcribed and filed in term time a lien upon the lands of the defendant from the date of the filing, but when filed in vacation it is a lien as against the judgment debtor from the day of filing, "and against subsequent judgment creditors from the first day of the next succeeding term, in the same manner, and to the same extent as if the judgment had been rendered in the district court." Section 563 declares that "execution may be issued thereon to the sheriff by the clerk of the court in the same manner as if the judgment had been taken in court, and the sheriff shall execute and return the same as other executions." It is plain from these provisions that the filing and docketing of such transcript does not transform the original judgment into a judgment of the district court. The statute authorizes such filing simply for the purpose of making the judgment a lien upon the real estate of the debtor and for being enforced by the issuing of execution out of the district court. (*People v. Doe*, 31 Cal., 220; *Martin v. Mayor*, 11 Abb. Pr. [N. Y.], 295.)

The transcriptive judgments of the several defendants in error not being judgments of the district court, the conclusion is irresistible that they are not proratable in the distribution of the fund in question. The clause in section 484, which provides that "in all other cases the writ of execution first delivered to the officer shall be first satisfied,"

Moores v. Peycke.

governs and controls in making distribution of the proceeds of the sale in the case at bar. The executions in favor of the defendants in error were not upon judgments obtained in the district court, nor were such executions placed in the sheriff's hands on the same day those in favor of the bank and D. M. Steele & Co. were delivered, but subsequently thereto; hence the writs first delivered to the officer must be first satisfied.

We have examined the three cases cited by counsel for the defendants and find them not in point. In *Wilcox v. May*, 19 O., 408, three judgments were entered at the suit of different creditors against the same defendant in the same court, at the same term, and executions were issued during the term, but on different days, directed to the sheriff of another county, which were levied upon lands of the debtor. The money arising from the sale being insufficient to satisfy all the writs, it was decided that it must be distributed *pro rata* among the three execution creditors. To the same effect is *Clevenger v. Hansen*, 24 Pac. Rep. [Kan.], 61. In *State v. Hunger*, 17 Neb., 216, twenty-four executions were issued upon separate judgments obtained in different justices' courts and placed in the officer's hands on the same day. It was held that the proceeds of the sale should be applied *pro rata* upon the several executions. The question we have been considering was not involved in any of the cases above referred to. The order of the district court is reversed and the cause remanded for further proceedings.

REVERSED AND REMANDED.

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45	279
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52	882

JOHN R. PERRY V. STATE OF NEBRASKA.

FILED APRIL 4, 1895. No. 7447.

1. **Criminal Law: NAMES OF STATE'S WITNESSES.** When the surname and the initials of the Christian name of a witness appear upon an information in a criminal prosecution, it is a sufficient compliance with the statute requiring the names of the state's witnesses to be indorsed upon the information before trial.
2. **Larceny: EVIDENCE.** In a prosecution for larceny, if the owner of the property alleged to have been stolen is examined as a witness upon the trial, his testimony that he did not consent to the taking of the property is indispensable to a conviction.

ERROR to the district court for Fillmore county. Tried below before HASTINGS, J.

Farrington Power and John C. Martin, for plaintiff in error.

A. S. Churchill, Attorney General, for the state.

NORVAL, C. J.

An information was filed by the county attorney in the district court of Fillmore county, charging John R. Perry, the plaintiff in error, with the larceny of a buggy of the value of \$50, the property of one John W. Frantz. Upon the trial of the prisoner a verdict of guilty was returned, and he was sentenced to the penitentiary for the period of one year and to pay the costs of the prosecution, taxed at \$228.68.

It is contended that the court erred in permitting Albert F. Herriot to testify as a witness on behalf of the state, for the reason that his full Christian name was not indorsed upon the information, his initials and surname alone being thereon indorsed. The statute, section 579 of the Criminal Code, requires that the names of the state's witnesses in a criminal prosecution must be indorsed upon the information

before the trial. Strictly speaking, the name of a person consists of his given and surname, yet we are unwilling to hold that the full Christian name of the witness must be indorsed on an information, although the better practice is for the county attorney to do so. Where the witness' surname and the initials of his Christian name appear upon the information it is a sufficient compliance with the law. Initials only for the given name are frequently used both in official and business transactions, and to declare that when such initials are employed it is no name would be a harsh rule. Such a construction would invalidate an information signed by the county attorney by the initials of his Christian name. It has been held that where an officer in signing the jurat to the verification of an information in a criminal case gave the initials only of his Christian name, it is a sufficient signing. (*Rice v. People*, 15 Mich., 9. See *Fewlass v. Abbott*, 28 Mich., 270.) The objection to the examination of the witness Herriot is not well taken, and is overruled.

The next assignment of error is that the verdict of guilty is not supported by sufficient evidence. The only testimony in the case was that given on the part of the prosecution, and it is urged that it does not show that the buggy in question was stolen, or taken without the consent of the owner. It is an elementary rule in criminal law that it is indispensable to the commission of larceny that the property alleged to have been stolen should have been taken against the will of the owner, and it is incumbent upon the state in such a prosecution to establish that fact before a conviction can be had. Does the proof show that the buggy was taken against the consent of the owner? The question must be answered in the negative. From the evidence returned in the bill of exceptions it appears that the prosecuting witness, John W. Frantz, at the time of the alleged theft resided in Fillmore county; that on July 29, 1894, he went to Geneva, the county seat, in his buggy,

arriving about 6 o'clock in the evening; that he tied his horse to the hitch rack in one of the principal streets of the city, the horse being attached to the vehicle; that about 10 o'clock of the same evening he returned to the place where he had left his rig and discovered that his horse was unhitched from the buggy and the latter was gone; that some five weeks thereafter the vehicle was found in the possession of the plaintiff in error; that the buggy was worth from \$40 to \$50. There is an entire lack of competent evidence in the case before us proving, or tending to establish, a want of consent to the taking of the buggy in dispute, on the part of Mr. Frantz, the owner. Although Mr. Frantz was called and examined as a witness by the state he was not interrogated, nor did he testify upon the point, whether or not he gave his consent or permission to the taking of the property. So far as the testimony in the record discloses, the buggy may have been taken by the permission of the owner, or under a claim of title, or under circumstances which repel all presumptions of felonious intent. Mr. Frantz being in attendance upon the trial as a witness, his testimony that he did not consent to the taking of the buggy was necessary to a conviction. The reason for the rule is that his testimony is the best evidence of the fact, and secondary evidence is allowable only when the primary or best evidence is not attainable.

In 1 Phillipps, Evidence [5th Am. ed.], note 183, section 635, it is said: "In all cases, but especially in this, the larceny itself must be proved by the best evidence the nature of the case admits. * * * This should be by the testimony of the owner himself, if the property was taken from his immediate possession, or if from the actual possession of another, though a mere servant or child of the owner, that other must be sworn, so that it may appear that the immediate possession was violated, and this, too, without the consent of the person holding it. Where non-consent is an essential ingredient in the offense, as it is

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here, direct proof alone, from the person whose non-consent is necessary, can satisfy the rule. You are to prove a negative, and the very person who can swear directly to the necessary negative must, if possible, always be produced. (*Rex v. Rogers*, 2 Campb. [Eng.], 654; *Williams v. East India Co.*, 3 East [Eng.], 192, 201.) Other and inferior proof cannot be resorted to till it be impossible to procure this best evidence. If one person be dead who can swear directly to the negative, and another be living who can yet swear to the same thing, he must be produced. In such cases, mere presumptive *prima facie* or circumstantial evidence is secondary in degree, and cannot be used till all the sources of direct evidence are exhausted."

This court in *Bubster v. State*, 33 Neb., 663, decided that in a prosecution for larceny the owner of the property ordinarily must be called as a witness to prove the taking of the property was without his consent. This doctrine is supported by the following authorities: *Rapalje, Larceny & Kindred Offenses*, sec. 135; *State v. Morey*, 2 Wis., 362; *State v. Moon*, 41 Wis., 684; *Erskine v. State*, 1 Tex. Ct. App., 405; *Jackson v. State*, 7 Tex. Ct. App., 363; *Wilson v. State*, 12 Tex. Ct. App., 481; *Bowling v. State*, 13 Tex. Ct. App., 338.

Because of the insufficiency of the evidence, the judgment is reversed and the cause remanded for a new trial.

REVERSED AND REMANDED.

W. C. COFFIELD V. STATE OF NEBRASKA.

FILED APRIL 4, 1895. No. 6853.

44	417
49	663
55	612
44	417
62	623

1. Criminal Law: PRELIMINARY EXAMINATION: WAIVER. A defendant, unless a fugitive from justice, is entitled to a preliminary examination before he can be placed upon trial in a

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prosecution by information, unless he waives such examination, which he may do either when brought before the examining magistrate, or when called upon to plead to the information in the district court.

2. ———: ———: OBJECTION AFTER VERDICT. It is too late after verdict to raise the objection that a preliminary examination has not been had for the crime charged in the information.
3. ———: ———: OBJECTION TO TRIAL. Such objection must be raised before going to trial by motion to quash the information or by plea in abatement.
4. Adoption of Foreign Statute and Construction. Where the legislature adopts the statute of another state, the judicial construction which it has already received in such state is also adopted.
5. Information Without Preliminary Examination: JURISDICTION. Fourth point of the syllabus of *White v. State*, 28 Neb., 341, overruled.

ERROR to the district court for Douglas county. Tried below before SCOTT, J.

Estelle & Hoepfner, for plaintiff in error:

Plaintiff in error having had a preliminary examination on a complaint charging the forgery of one instrument, the filing of an information by the county attorney charging the forgery of another instrument was without jurisdiction and void. (*White v. State*, 28 Neb., 341.) •

A. S. Churchill, Attorney General, for the state:

An immaterial variance should be disregarded. (*Moore v. State*, 20 Tex. App., 233; *Johnston Harvester Co. v. Clark*, 30 Minn., 308; *Kopplekom v. Huffman*, 12 Neb., 99; *Began v. O'Reilly*, 32 Cal., 11; *Plate v. Vega*, 31 Cal., 383; *Hedrick v. Osborne*, 99 Ind., 143.)

NORVAL, C. J.

An information was filed in the court below containing two counts, one charging the plaintiff in error with the

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forgery of a draft and the other with the uttering and publishing of the same instrument. To the information a plea of not guilty was entered by the accused, whereupon he was tried and convicted under both counts.

But one ground is urged in this court for a reversal of the judgment, and that is the prisoner has not had a preliminary examination for the offenses charged in the information. The record shows, and it is conceded by counsel for the plaintiff in error, that a complaint under oath was made before a magistrate charging the accused with having forged and uttered a certain bank draft, and that a preliminary examination was duly had before such magistrate prior to the filing of the information in the district court. It is insisted, however, that the draft set out in the complaint and the one set forth in the information are different instruments. The following is a copy of the draft contained in the complaint:

"No. 34872. FT. SCOTT, KANSAS, Nov. 13, '93.

"Chase National Bank of New York, pay to the order of W. C. Coffield (1800.00) eighteen hundred dollars.

"STATE BANK OF FT. SCOTT,
"JAS. R. COLEAN, *Cashier*."

The instrument set forth in the information under which the conviction was had is in the words and figures following:

"FORT SCOTT, KANSAS, Nov. 13, 1893. No. 34872.

"The State Bank of Fort Scott, pay to the order of W. C. Coffield (\$1800.00) eighteen hundred dollars.

"To Chase National Bank, New York.

"JAMES R. COLEAN, *Cashier*."

A comparison will disclose that the complaint and information described and set forth substantially the same offense. In the complaint the "No. 34872" appears upon the upper left-hand corner of the draft, while the same number is on the right-hand corner of the instrument

copied into the information. The words "State Bank of Ft. Scott" are immediately above the signature of the cashier on the draft as copied into the complaint, while they appear on the second line from the top of the instrument set out in the information. Again, the words "Chase National Bank of New York" are on the second line of the draft alleged in the complaint to be forged, and the words "To Chase National Bank New York" appear in the copy of the instrument in the information just above the name of the cashier. The variances above indicated are insufficient to show that a different crime is alleged in the information from that for which the preliminary examination was had. Both before the magistrate and in the district court the plaintiff in error was charged with the forging and uttering of the same obligation. The instrument set out in the information bears the same date, is for a like amount, purporting to have been drawn by the same individual as cashier and upon the same bank as the one copied into the complaint. The purport and effect of each is identically the same, notwithstanding the slight and immaterial variance alluded to. In no proper sense is a preliminary examination before a magistrate a trial, and the rules which govern in respect to the fraud and construction of criminal pleadings are not applicable to such proceedings. The objection that plaintiff in error has not had a preliminary examination for the matters averred in the information is not well taken.

For another reason a reversal cannot be had upon the ground urged. No complaint was made in the trial court that a preliminary examination was not had, until after verdict, the objection being first presented in the motion for a new trial and then by a motion in arrest of judgment. This was too late. It should have been raised before he pleaded not guilty, either by a motion to quash the information or by plea in abatement on the ground that there had been no preliminary examination as required by stat-

ute, and no waiver of the same. (*Cowan v. State*, 22 Neb., 519; *Davis v. State*, 31 Neb., 252.)

Section 585 of the Criminal Code in express terms provides that a preliminary examination may be waived. It is obvious that this may be done either when the defendant is called upon to plead to the information, or when brought before the examining magistrate. The failure to give a prisoner a preliminary examination does not oust the district court of jurisdiction. It is a mere defect in the proceedings which the accused may waive, and he will be deemed to have done so if the objection is not timely made. If there could be any doubt upon the proposition, it is set at rest by section 444 of the Criminal Code, which declares that "the accused shall be taken to have waived all defects which may be excepted to by motion to quash, or a plea in abatement, by demurring to an indictment or pleading in bar, or the general issue." We are aware that in *White v. State*, 28 Neb., 341, this court has held that an information filed by the county attorney in the district court without a previous examination for the offense before a magistrate, except the accused is a fugitive from justice, confers no jurisdiction upon the district court, but the doctrine therein laid down is unsound and the case has been practically overruled by later decisions of this court. In *White v. State, supra*, too narrow a construction was placed upon the statute; besides, the provisions of section 444, already quoted, were entirely overlooked. Again, *People v. Chapman*, 62 Mich., 280, was relied upon as a precedent, yet this court overlooked the fact that the objection in the Michigan case, that there had been no preliminary examination and no waiver thereof, was raised by a motion to quash, while in *White v. State* the objection was not taken until after the verdict.

It has been held that defects in the verification of an information are waived unless made before trial. (*Davis v. State*, 31 Neb., 247; *Hodgkins v. State*, 36 Neb., 160; *Bailey v. State*, 36 Neb., 808.) And in the language em-

ployed by Judge Post in his opinion in *Hodgkins v. State*, "The provision for the verification of an information before a magistrate is surely not more imperative than the provision found in section 585 of the Criminal Code, that no information shall be filed against any person, except fugitives from justice, until such person shall have had a preliminary examination as provided by law. Yet it has been repeatedly held that by pleading not guilty, and going to trial on the issue thus formed, the accused waives his right to object on the ground that he has not had a preliminary examination."

The statute of Michigan relating to prosecutions of offenses by information contains this provision: "No information shall be filed against any person, for any offense, until such person shall have had a preliminary examination therefor, as provided by law, before a justice of the peace, or other examining magistrate or officer, unless such person shall waive his right to such examination; *Provided however*, That informations may be filed without such examination against fugitives from justice." (Michigan Laws of 1859, p. 393, sec. 8.) Section 585 of our Criminal Code was copied literally from the statute of the state of Michigan, and that too after it had been construed by the highest tribunal of that state. The precise question first came before the supreme court of Michigan in 1862, in *Washburn v. People*, 10 Mich., 383, in which Christiancy, J., after quoting the statute says: "It is not doubted that a defendant, unless a fugitive from justice (which is not pretended here), has a right to insist upon such examination before he can be put upon his trial, or called upon to answer the information. But the statute is express that he may waive his right; and we think he may waive it when called upon to plead to the information, as well as when brought before the magistrate for examination. It is not a matter which goes to the merits of the trial, but to the regularity of the previous proceedings. If he make no

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objection on the ground that such examination has not been had or waived, he must be understood to admit that it has been had, or that he has waived or now intends to waive it. If he intends to insist upon the want of the examination, we think he should, by plea in abatement, set up the fact that it has not been had, upon which the prosecuting attorney might take issue, or reply a waiver; or he must upon a proper showing by affidavit, move to quash the information. The latter is the simpler course." The same doctrine has been adhered to in *Hicks v. People*, 10 Mich., 395; *People v. Jones*, 24 Mich., 214; *Hamilton v. People*, 29 Mich., 177; *People v. Williams*, 53 N. W. Rep. [Mich.], 779.

It is a familiar rule that the legislature by adopting the statute of another state thereby adopts the construction it has already received by the courts of that state. It follows that where a defendant pleads not guilty to an information and goes to trial without any objection that a preliminary examination has not been had or waived, he will be considered to have waived such examination. The judgment is

AFFIRMED.

NELSON MORRIS, APPELLANT, V. MARION G. MERRELL
ET AL., APPELLEES.

FILED APRIL 4, 1895. No. 6745.

1. **Counties: COUNTY BOARD: PROCEEDINGS.** County commissioners cannot legally transact county business except at a regular session of the county board, or one specially called by the county clerk of which notice is given in the mode provided by law.

2. ———: **LOCATION OF DRAINAGE DITCHES: VALIDITY OF PROCEEDING.** On July 9, 1892, a petition for the location and construction of a ditch was filed with the county clerk of B. county, and on the same day the county commissioners adjourned to meet

44	423
46	511
44	423
52	350
153	170
54	378
44	423
58	826
44	423
61	82
61	881
44	423
62	49
62	53

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on August 2, following. On July 16, without any special session of the county board being called, two members of the board of county commissioners, together with the county surveyor, met at the office of the county clerk, and upon consideration of said petition located the proposed ditch and ordered the construction thereof. *Held*, That the proceedings were a nullity, and the special assessments levied for the purpose of paying for such improvement were absolutely void.

3. **Injunction: RESTRAINING COLLECTION OF VOID TAXES: PARTIES.** A party who is not guilty of laches may invoke the aid of a court of equity to restrain the collection of a void tax or assessment.

APPEAL from the district court of Burt county. Heard below before FERGUSON, J.

Wharton & Baird and *H. Wade Gillis*, for appellant, cited: *Commissioners of Merrick County v. Baty*, 10 Neb., 176; *Morrill v. Taylor*, 6 Neb., 246; *Lyman v. Anderson*, 9 Neb., 367.

W. G. Sears, Lake, Hamilton & Maxwell, and *Jesse T. Davis, contra*, cited: *Touzalin v. City of Omaha*, 25 Neb., 817.

Ira Thomas, also for appellees.

NORVAL, C. J.

This action was brought by Nelson Morris in the district court of Burt county to enjoin the location and construction of a ditch over his lands, and to restrain the collection of the special assessments made against said lands for the purpose of paying the costs of constructing said ditch. A general demurrer to the petition was sustained by the court and the action dismissed. Plaintiff appeals.

It appears from the petition that on the 9th day of July, 1892, there was filed in the office of the county clerk of Burt county a petition signed by J. H. Stork and others, praying the board of county commissioners to locate and

construct a ditch upon a certain described route, the same being over and across lands owned by the plaintiff; that on the 16th day of the same month two of the county commissioners, W. T. Berry and F. E. Higley, with the county surveyor, W. E. Pratt, met in the county clerk's office and, upon consideration of the petition, entered an order upon the journal of the commissioners to the effect that the improvement is necessary and will be conducive to the public health, convenience, and welfare, and that the proposed location is the best and the most practicable route. W. E. Pratt was appointed engineer on said ditch, and ordered at once to make the necessary survey, levels, and estimates, also the assessments against the lands benefited by said improvement. Subsequently, the county commissioners adopted the report and assessment made by the engineer. Claims for damages by reason of the location of the ditch were allowed C. M. Woodworth, A. J. McClannahan, and May Burch, all other claims being rejected. Advertisement for bids for the construction of the proposed ditch was made, bids were received, and the contract for said construction was awarded to the defendant George Southerland. It is also alleged that on December 2, 1892, the county clerk, without any order or entry of an order from the board of county commissioners, made and delivered to the county treasurer a special duplicate containing said assessment; that the county treasurer, unless restrained, will advertise and sell plaintiff's land to pay said assessments; that the county commissioners will allow claims for work upon said ditch, for damages occasioned thereby and for payment for other costs and expenses, including services of the engineer; that George Sutherland threatens, and is about, to construct said ditch across the lands belonging to plaintiff. The sixth paragraph of the petition is in the following language:

"6. Plaintiff alleges that the whole of the proceedings of the board of county commissioners of said Burt

county, and of said county clerk, are utterly void and without authority or warrant of law, because the said county clerk did not at the next meeting, after the filing of the petition for the construction of said ditch herein referred to, deliver a copy of said petition to the board of county commissioners at their next meeting after the filing of said petition on the 9th day of July, 1892. Plaintiff alleges that on the 16th day of July, 1892, that the pretended meeting of W. T. Berry and the hereinbefore mentioned F. E. Higley was utterly and absolutely void, without authority or warrant at law, because the same was not upon a day fixed by statute for holding meetings of boards of county commissioners; that it was not a meeting which had been called or pretended to be called, or was special, of said board of county commissioners; nor was the same upon a day to which said board of county commissioners had adjourned, but plaintiff alleges the fact to be that on the 9th day of July, 1892, said board of county commissioners adjourned until the 2d day of August, 1892."

The first point made by the appellant, and upon which he relies for a reversal of the judgment, is that the proceedings had on July 16, 1892, ordering and locating the ditch in question, are without jurisdiction and void, for the reason that the board of county commissioners were neither in regular nor special session on that date, and therefore could not legally transact any official business at that time.

In our view the objection is well taken. Sections 56 and 57, chapter 18, Compiled Statutes, are as follows:

"Sec. 56. The county commissioners shall meet and hold sessions for the transaction of county business at the court house in their respective counties, or at the usual place of holding sessions of the district court, on the second Tuesday in January, third Monday in June, and first Tuesday in October of each year, and may adjourn from time to time.

"Sec. 57. The county clerk shall have power to call

special sessions when the interests of the county demand it, upon giving five days' notice of the time and object of calling the commissioners together, by posting up notices in three public places of the county, or by publication in a newspaper published therein."

The first section quoted above fixes the time for holding the regular meetings of the county board, and authorizes the board to prolong a session by regular adjournments. By said section 57 provision is made for the calling of special sessions of the county board, and it specifies by whom and in what manner the same shall be called, and prescribes the manner in which notice of such called session shall be given. The county commissioners of a county can only transact county business at the time specified in said section 56 or at some regular adjourned session of the board, or a special session called in the manner pointed out in section 57. Such is evidently the legislative will. The statute is imperative, and must be followed. A special session of the board can only be called in the mode provided by law and notice thereof must be published or posted as the statute directs. Such notice is essential to the validity of the proceedings at the special session. It is jurisdictional. The failure to give the required notice is not a mere irregularity. From an examination of the averments of the petition in this case it fully appears that the petition for the location of the ditch was filed on July 9, 1892, the same day on which the county board adjourned to meet on the 2d day of August, 1892. Without a called session of the county board, the commissioners, or any two of them, could not lawfully meet and transact county business prior to the last named date. The petition for the ditch was acted upon at an alleged session held on July 16th, at which but two of the commissioners were present. There was no call issued by the county clerk for the convening of the county board at that time, nor was any notice of such pretended meeting given. The proceedings locating the ditch were without

jurisdiction, and are void. They are of no greater validity than had the same been made by any other two citizens of the county. Suppose after this court has adjourned to a day certain two members thereof should meet at the capitol before the date fixed for the convening of the court and render a judgment in a pending cause. Would such judgment have any validity? Clearly not. (*In re Terrill*, 52 Kan., 29; *In re McClusky*, 52 Kan., 34.) In principle there is no distinction between the case supposed and the one before us. In *Morrill v. Taylor*, 6 Neb., 246, it is said: "The jurisdictional fact must exist before an irregularity can occur, for without the existence of such fact there is in law no assessment, and all subsequent acts of the officers are mere nullities."

It is argued by counsel for appellees that plaintiff cannot maintain this action for the reason he has not paid to the county treasurer the amount of the alleged special assessment made against his lands. This contention is founded upon section 28 of "An act to provide for draining marsh and swamp lands in the state of Nebraska," the same being chapter 89 of the Compiled Statutes. The section declares: "The collection of assessments to be levied to pay for the location or construction of any ditch shall not be enjoined nor declared void; nor shall said assessment be set aside in consequence of any error or irregularity committed or appearing in any of the proceedings provided by this act, and no injunction shall be allowed restraining the collection of any assessment until the party complaining shall first pay to the county treasurer the amount of his assessment, which amount so paid may be recovered from the county in an action brought for that purpose in case such injunction is made perpetual." It must be conceded that the foregoing provision applies to all cases where a mere error or irregularity has been committed in the proceedings leading up to, and including, the assessment. Where the assessment is not void, but is simply irregular or erro-

neous, a court of equity will not interfere by injunction to prevent the collecting of such assessment. (*South Platte Land Co v. City of Crete*, 11 Neb., 344; *Spargur v. Romine*, 38 Neb., 736.) But the rule is otherwise where the assessments are absolutely void for want of jurisdiction or power to impose the same. In such case, a party may invoke the aid of a court of equity, notwithstanding the provisions of said section 28. (*Touzalin v. City of Omaha*, 25 Neb., 817; *Bellevue Improvement Co. v. Village of Bellevue*, 39 Neb., 876; *Thatcher v. Adams County*, 19 Neb., 485.)

This court, in construing a provision similar to said section 28, in the opinion in *Touzalin v. City of Omaha, supra*, uses this language: "It will be observed that the above statute relates to a special tax or assessment which is apparently legal, but by reason of irregularities or error in the proceedings may be open to attack. It does not apply to a tax or assessment which is absolutely void. Where a tax is just in itself, but there are irregularities or errors in the proceedings, or where a party has permitted a municipality to improve his property and add to its value by grading or otherwise improving the streets of the city, the legislature no doubt by general statute may require him to pay the taxes assessed against his property for such improvements, and provide the procedure by which the same or some portion thereof claimed to be illegal may be recovered back. Injunctions to prevent the collection of taxes are not favored, and should only be granted where the relief at law is wholly inadequate. If, however, the tax is void, in other words, is levied without authority of law, the forms of law nevertheless being used to cast a cloud upon the title of the party's real estate and thereby diminish its value, the power of the legislature to close the doors of the courts to aid the taxpayer is very doubtful. A void tax is no tax. How then can the statute debar the taxpayer from enjoining the unlawful sale of his property to pay such al-

leged taxes? The law might as well authorize the seizure of the property of A by force and violence, and without authority, to pay the debts of a municipality as to seize and sell such property under a void assessment. In either case the taxpayer may invoke the aid of the courts to protect him from wrong and oppression. The rule is, that where public officers are proceeding illegally under claim of right they may be enjoined. (*Johnson v. Hahn*, 4 Neb., 139; *Mohawk & H. R. R. Co. v. Artcher*, 6 Paige Ch. [N. Y.], 88; *Belknap v. Belknap*, 2 Johns. Ch. [N. Y.], 472; *Livingston v. Livingston*, 6 Johns. Ch. [N. Y.], 497; *Hamilton v. Cummings*, 1 Johns. Ch. [N. Y.], 516; *Hughes v. Trustees*, 1 Ves. Sr. [Eng.], 188.)"

Having reached the conclusion that the proceedings by which the ditch was located and the alleged assessments made, were not irregular or erroneous merely, but entirely void, it follows that plaintiff was not required to pay such assessment and then bring an action at law to recover the money back, but is entitled to invoke the aid of a court of equity to restrain the collection of the assessment. The judgment is reversed and the cause remanded for further proceedings.

REVERSED AND REMANDED.

JERRY D. WOODS V. STATE OF NEBRASKA, EX REL.
JAMES C. MCNERNEY.

FILED APRIL 4, 1895. No. 7320.

1. **Elections: ARRANGEMENT OF PARTY NAMES.** Some discretion is conferred upon the officer charged with the preparation of the official ballot, such as the arrangement thereon of party names and in other respects not inconsistent with the spirit and purpose of the law, and the exercise of such discretion will not be controlled by the court.

44	430
57	42
57	189

2. Mandamus: AUSTRALIAN BALLOTS: PARTY NAMES: COUNTY CLERKS. Certain candidates for state offices were, according to the certificate of the secretary of state, nominated by the people's independent party and also by the democratic party. The respondent, as clerk of L. county, in preparing the ballot allotted to each candidate, together with the above party names, one line, thus:

"For Lieutenant Governor.

"James N. Gaffin, of Colon. Democrat—People's Independent."

Subsequently, the district court allowed a peremptory writ of *mandamus* commanding the respondent to so prepare the ballot that the names of all candidates who had received more than one nomination would be followed by the names of the parties or principles represented by them on parallel lines preceded by a brace, thus:

"For Lieutenant Governor,

"James N. Gaffin, of Colon,

{ People's Independent
{ Democrat."

Held, Error, since discretion in the arrangement of the ballot is conferred upon the county clerk, and in the absence of abuse thereof the courts are not authorized to interfere.

ERROR from the district court of Lancaster county.
Tried below before HALL and TIBBETS, JJ.

A. J. Sawyer and A. W. Field, for plaintiff in error.

William Leese, contra.

POST, J.

This cause was submitted by agreement at the last term and a judgment reversing the order of the district court then announced. The facts established by the evidence are all shown by the written stipulation of the parties, and are, so far as essential to an understanding of the question presented, as follows: The plaintiff in error, as clerk of Lancaster county, had prepared and caused to be printed the sample and official ballots for use by the electors of said county at the general election for the year 1894. Said ballots contained the names of all candidates for the several state offices certified to the plaintiff in error as county

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clerk by the secretary of state, and were, it is conceded, in all respects conformable to law except as hereafter mentioned. Certain candidates for state offices, including the offices of governor, lieutenant governor, attorney general, and superintendent of public instruction, were, according to the certificate of the secretary of state, the nominees of two parties, to-wit, the people's independent party and the democratic party. In the preparation of the said ballots, the plaintiff in error allotted one line thereon to the name of each candidate, together with the party designations to which he was entitled, thus:

FOR LIEUTENANT GOVERNOR.	VOTE FOR ONE.
Belle G. Bigelow, of Lincoln.	Prohibition
Rodney D. Dunphy, of Seward.	Straight Democrat
James N. Gaffin, of Colon.	Democrat and People's Independent
Robert E. Moore, of Lincoln.	Republican.

The defendant in error, who is the chairman of the people's independent party for Lancaster county, being dissatisfied with the form of the ballot, applied to the district court of said county for a writ of *mandamus* requiring the plaintiff in error, who was made the respondent therein, to cause the names of all candidates who had received more than one nomination to be followed by a brace with the names of the parties or principles represented by them on parallel lines to the right thereof. On a final hearing the district court made the following among other findings:

"We find and hold that the only legal way to prepare and print the ballots in such a case is to place a brace after the name of the candidate, and to place the names of the parties or principles represented by such candidate to the right of the brace, one above another, within the space allowed the name of the candidate on the ballot, thus:

FOR LIEUTENANT GOVERNOR.	VOTE FOR ONE.
James N. Gaffin, of Colon.	{ People's Independent. Democrat.

And we find and hold the method adopted by respondent to be an error in the printing of the sample and official ballots."

Judgment having been entered in accordance with the views expressed in the finding above set out, the cause was removed into this court for review upon the petition in error of the respondent.

It is not claimed that the ballot act contains any provision pertaining to the printing of the ballots aside from that found in section 14, which is, so far as material in this connection, as follows: "Every ballot shall contain the name of every candidate whose nomination for any office specified in the ballot has been certified or filed according to the provisions of this act, and no other names. The names of candidates for each office shall be arranged under the designation of the office in alphabetical order according to surnames, except that the names of electors of president and vice president of the United States presented in one certificate shall be arranged in a separate group. Every ballot shall also contain the name of the party or principle which the candidates represent as contained in the certificates of nomination," etc. (Compiled Statutes, ch. 26, sec. 139.) It would seem that some discretion is of necessity conferred upon the several officers charged with the duty of printing and distributing the ballots, such as the arrangement thereon of party names and in other respects not inconsistent with the spirit and purpose of the act. We recently held in *State v. Allen*, 43 Neb., 651, that the act under consideration contemplated that the name of each candidate should appear once only on the official and sample ballots, accompanied by such political or other designations as correspond to his nomination papers on file with the proper officer. The reason upon which that conclusion rests is that the tendency of repeating the names of candidates on the ballot, accompanied by different political designations, without disclosing their identity or indicating that they represent two or more parties, is to deceive the ignorant and uninformed,—a result so radically at variance with the expressed purpose of the act as to

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leave no doubt of the intention of the legislature. But the arrangement of party names is manifestly non-essential and within the discretion of the officer charged with the duty of preparing the ballot, provided each candidate be given the political or other designations to which he is entitled; and the discretion thus conferred cannot be regulated or controlled by the judicial power of the state. It follows, therefore, that in awarding the writ of *mandamus* the district court erred, for which the judgment is reversed.

We must not from what has been said be understood as intimating that the form of ballot prescribed by the district court is in any way objectionable to the statute. On the contrary, had the respondent decided to print the party names on parallel lines preceded by a brace in accordance with the request of the relator, his action would have been a substantial compliance with the provisions of the statute. What we decide is that the discretion in this instance has been conferred upon the county clerk and not upon the district court.

REVERSED.

44 434
52 237

STATE OF NEBRASKA, EX REL. ELMER B. STEPHENSON,
V. M. M. COBB.

FILED APRIL 4, 1895. No. 7226.

1. **Municipal Corporations: ROAD TAXES: STATUTES.** The provision of section 49 of the act of March 29, 1889, for the incorporation of cities of the first class, that "the road taxes collected from property in the city shall be paid to the city treasurer and expended as the council may direct," has reference merely to such taxes as are by general law collected for the use of the city as a road district, and was not intended as a repeal of the provision of section 76 of the general road law for the distribution of the county road fund.
2. **Statutes: CONSTITUTIONAL LAW.** But assuming the legislature

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by the act first above mentioned to have intended a repeal of the provision of the general road law for the distribution of the county road fund so far as it affects cities of the first class, it is within the restriction contained in section 11, article 3, of the constitution and, therefore, void.

ERROR from the district court of Lancaster county.
Tried below before HALL, J.

N. C. Abbott and Abbott, Selleck, & Lane, for plaintiff in error, cited: *State v. Howe*, 28 Neb., 618.

W. H. Woodward, contra, cited: *City of Tecumseh v. Phillips*, 5 Neb., 505; *White v. City of Lincoln*, 5 Neb., 505; *State v. Lancaster County*, 6 Neb., 474; *Burlington & M. R. R. Co. v. Saunders County*, 9 Neb., 507.

POST, J.

This was a proceeding by *mandamus* in the district court for Lancaster county on the relation of Elmer B. Stephenson, as treasurer of the city of Lincoln, against M. M. Cobb, the respondent, as county treasurer, to require the payment by the latter of certain moneys claimed by the city and belonging to the road fund of said county.

In order to reach an understanding of the question presented by the record it is necessary to examine certain provisions of the statutes which appear to bear directly upon the subject. It is provided by section 76 of the general road law that "In counties not under township organization, one-half of all the moneys paid into the county treasury in discharge of road tax shall constitute a county road fund, which shall be at the disposal of the county commissioners for the general benefit of the county for road purposes. The other half of all moneys paid into the county treasury in discharge of road tax and all money paid in discharge of labor tax shall constitute a district road fund, which shall be paid by the county treasurer to the overseer of the road district from which it was collected," etc. On April

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7, 1891, an act was approved with an emergency clause, entitled "An act to amend section 76 of chapter 78, Compiled Statutes, [the general road law,] and to repeal said original section." (Laws, 1891, p. 314, ch. 43.) The only material amendment of the section mentioned is the addition thereto of the following: "*Provided*, That the commissioners of counties not under township organization may levy the same rate of tax upon the property within any incorporated city of the metropolitan class and cities of the first class as is levied upon property situated within the several road districts, and all moneys paid into the county treasury in discharge of road tax levied upon property within the corporate limits of any such city shall constitute a part of the general road fund of the county and be subject to the disposal of the county commissioners for the general benefit of the county and city, one-half of which shall go to the county for road purposes and one-half to the council of said cities to be used for road purposes." On the 29th day of March, 1889, there was approved "An act to incorporate cities of the first class, and regulating their duties, powers, government, and remedies," and which will, for convenience, be referred to as the charter of the city of Lincoln, which is, as alleged, a city of the first class within Lancaster county,—a county not under township organization. We find therein no authority for a road tax, but in section 49, after a provision for the levy of taxes for various purposes incident to municipal government, is used the following language, evidently referring to the tax contemplated by the general road law, viz.: "The road taxes collected on property in the city shall be paid to the city treasurer and expended as the council may direct." On the 9th day of April, 1891, an act was approved entitled "An act to amend sections 1, 10, 12, 13, 14, 17, 25, 26, 27, 42, 46, 49, 51, subdivisions 3, 6, and 31 of section 67 and sections 69, 71, 84, 87, and 91 of an act entitled 'An act to incorporate cities of the first class,' etc., and to repeal said original

sections and subdivisions. The amendments therein of section 49 are few and unimportant and in no way relate to the provision under consideration.

Counsel for the relator appear to regard the provisions above quoted as irreconcilable, from which they argue that the re-enactment of section 49 of the city's charter on April 9, 1891, two days later than the re-enactment of section 76 of the road law, being the latest expression of the legislative will, worked a repeal of the previous act in so far as they are inconsistent with each other. But we believe the alleged inconsistency to be imaginary rather than real, and that when we take into consideration the history and evident purpose of the respective provisions there will be found no difficulty in giving effect to both. In the first place, the general law merely provided for payment of one-half the county road fund to the overseer of the road district from which it was collected; second, the only provision of the act, as it then existed, defining road districts was that contained in section 53, as follows: "The county board shall divide the county, except that portion occupied by cities and incorporated villages, into as many road districts as may be necessary, and may alter the boundaries thereof as may seem proper," etc. And although it was probably intended that each city and village should constitute a single road district and be in that regard independent of the county board, it was not in express terms so provided. Nor did the law designate the officer or board authorized to receive or disburse the moneys apportioned to such city or village out of the county road fund. Again, it will be observed that the charter of the city does not provide that all road taxes collected from property within the city shall be paid into the city treasury, and does not on its face purport to repeal existing provisions on the subject. Viewed in the light of the foregoing facts the provision under consideration would seem to contemplate such funds only as are by general law collected for the use

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of the city as a road district; that its purpose was merely to provide an agency for the receipt and disbursement of such funds, and not the repeal of any part of the road law of the state. But assuming, for the purpose of this investigation, that there exists a radical conflict between the city's charter and the general road law, and that the intention of the legislature was by enacting the former to repeal the latter, it is within the prohibition of section 11, article 3, of the constitution and, therefore, void.

It is not our purpose at this time to review the cases in which construction has been given to that section of the fundamental law. We do not doubt that a provision for the receipt and disbursement of the road fund within cities of the first class is germane to the title of the act to which reference is here made as the charter of the city of Lincoln. But an attempt to thus amend an existing general law by a provision which is in effect a repeal thereof, without any reference to the prior act, presents an entirely different question, and is, without doubt, within the restriction above cited. (*Vide City of South Omaha v. Taxpayers' League*, 42 Neb., 671, and cases cited.) It follows that the order of the district court sustaining the demurrer to the petition and dismissing the proceedings is right and must accordingly be

AFFIRMED.

S. W. BURNHAM V. STATE OF NEBRASKA, EX REL.
FARMERS LOAN & TRUST COMPANY.

FILED APRIL 4, 1895. No. 6584.

1. **Registration of Tax Deeds.** The provision of the revenue law for the recording of treasurer's tax deeds is mandatory in the sense only that it is made the duty of the register of deeds to record such conveyances when presented for that purpose, accompanied by the fee prescribed by law.

2. **County Treasurers: TAX DEEDS: COLLECTION OF REGISTRATION FEES.** A county treasurer is not entitled as a condition to the execution and delivery of a tax deed to demand and collect the fee allowed the register of deeds for recording the evidence upon which such conveyances are issued.

ERROR from the district court of Lancaster county.
Tried below before STRODE, J.

W. H. Woodward, for plaintiff in error.

M. J. Sweeley and John L. Doty, contra.

POST, J.

This is a petition in error from the district court for Lancaster county and presents for review the judgment of that court awarding a peremptory *mandamus*, commanding the plaintiff in error, as county treasurer, to execute and deliver to the relator, defendant in error, a treasurer's tax deed for certain property in said county. The only defense interposed by the respondent below is indicated by the following quotation from his answer: "For a further answer to the petition defendant says that he refused to make, execute, and deliver to the plaintiff a tax deed to the land in question for the reason that the plaintiff failed and refused to comply with the statutes in such cases made, in that it failed and refused to tender to defendant the necessary money and funds to pay the register of deeds of said county for recording the evidence upon which said tax deed would be issued, to-wit, the notice, affidavit, and certificate; that by the statutes of this state it is made the duty of the register of deeds to record such evidence as above specified, and allow the said register to charge the regular fees for placing the same on record, and makes it the duty of this defendant, as county treasurer, to deliver to the register of deeds the evidence upon which said tax deed should be issued for the purpose of having the same recorded," etc. It will be observed that there is here presented no question

involving fees payable to the treasurer himself as a condition to the execution of the tax deed. The single point of the controversy is the duty of the respondent to protect the register of deeds by collecting in advance fees which the latter is by law authorized to charge for recording the evidence upon which such deeds are issued.

The provisions of statute to which we have been referred as bearing upon the subject are section 123 of the revenue law, requiring notice of the expiration of the time of redemption, and which is made a condition precedent to the right of the purchaser to demand a deed; section 124, requiring proof of service of notice by affidavit and prescribing a penalty for false swearing; section 126, authorizing the execution of deeds on request within the prescribed period after the expiration of the time within which to redeem, upon the production of the certificate of purchase, and upon compliance with the preceding sections; section 127, prescribing the form of tax deeds and providing that they shall be recorded in the same manner as other conveyances of real estate; and section 128, which is here set out: "County clerks shall record the evidence upon which the deeds are issued, and be entitled to the same fee therefor that may be allowed by law for recording deeds, and the county treasurer shall deliver the same to the county clerk for that purpose, and in case of the loss of any certificate, on being fully satisfied thereof by due proof, and bond given to the state of Nebraska in a sum equal to the value of the property conveyed, as in cases of lost notes or other commercial paper, the county treasurer may execute and deliver the proper conveyance, and file such proof and bond with the clerk to be recorded as aforesaid."

We are unable to perceive any substantial grounds for the claim of the plaintiff in error. The foregoing provisions, so far as they relate to the record of the evidence of title, are, like all kindred provisions, for the benefit of the

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purchaser, and may, therefore, be waived by him. They are mandatory in the sense that it is the duty of the treasurer to execute the deed on the production of the evidence prescribed by statute, and also the duty of the register to record such deed and evidence on request and tender of the requisite fee, but in no other sense can they be said to be mandatory. The recording of his tax deed is a subject within the discretion of the defendant in error, and the inference is a reasonable one in view of recent constructions of the revenue law that it does not attach sufficient importance to a treasurer's deed as evidence of title to justify the expense of procuring it to be recorded; but however that may be, it will be time for the plaintiff in error to deliver to the register of deeds the statutory evidence whenever the defendant in error shall present his deed for record and tender the proper fee therefor, including charges for the recording of the evidence here mentioned. The judgment is right and is accordingly

AFFIRMED.

TONY CORNELIUS ET AL. V. CAROLINE HULTMAN
ET AL.

44	441
53	609
44	441
56	608

FILED APRIL 4, 1895. No. 6055.

1. Intoxicating Liquors: DEATH FROM DRUNKENNESS: ACTION AGAINST SALOON-KEEPER: DAMAGES: QUESTION FOR JURY. H., a section foreman, left his home in company with a friend on a hand-car to transact business in the city of K., four miles distant, where they arrived about 5:45 P. M., and went direct to the saloon of C., and each drank whiskey. They returned to the saloon twenty or thirty minutes later and again drank whiskey, and where H. remained, except at short intervals, until nearly 11 P. M., in the meantime drinking three or four glasses of beer in said saloon. About the hour last named they started to return home on the hand-car, but were run down by a fast passenger train and H. instantly killed. One of the station men

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observing that the deceased was drunk and staggering, cautioned him against starting ahead of the passenger train, which was due to arrive in ten minutes. The evidence of C. tended to prove that they did not observe the train until about the instant of the collision, although both were aware that it was then due. *Held*, The question whether the liquor furnished by C. contributed to the fatal result so as to render him liable in an action under the statute by the widow of the deceased was properly submitted to the jury.

2. ———: ———: ———: EVIDENCE. It is immaterial whether the deceased was on account of drunkenness physically incapable of jumping from the hand-car, or whether he was thereby rendered insensible to the peril of his position until too late to escape. The foregoing evidence accordingly *held* admissible under an allegation that "Said H., on account of his drunken condition, was unable to alight from said hand-car and was struck," etc.
3. ———: ———: ———: ———. *Held*, On the evidence adduced, that the drunkenness of the deceased was the primary cause of the fatal accident, and that the court did not err in refusing to submit to the jury the question of the negligence of the railroad company.
4. Damages: EVIDENCE. Evidence examined, and *held* sufficient to sustain the verdict in favor of the plaintiff below.

ERROR from the district court of Buffalo county. Tried below before HOLCOMB, J.

H. M. Sinclair, for plaintiffs in error.

Dryden & Main and *Greene & Hostetler*, contra.

POST, J.

This was an action in the district court for Buffalo county by Caroline Hultman, widow of Gust Hultman, deceased, in her own behalf and in behalf of her minor children, against the plaintiffs in error on the bond of Tony Cornelius, a licensed saloon-keeper, for damages on account of the death of said Hultman, while under the influence of intoxicating liquors sold and furnished him by said Cornelius. A trial before the district court resulted in a verdict

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and judgment for the plaintiffs therein, which it is sought to reverse by means of a petition in error addressed to this court.

The first proposition asserted in the brief of plaintiffs in error is that the verdict is not sustained by the evidence and should have been arrested on that ground. That contention necessitates a brief recital of the facts so far as disclosed by the record. On the night in question the deceased, who had for six years last preceding been in the employ of the Union Pacific Railroad Company as section foreman at Buda, a station on its main line, left home in company with one Carlson, going to Kearney, about four miles distant, on a hand-car for the purpose of procuring provisions for his family. About 11 o'clock of the same night he started for his home on the hand-car but was run down and killed by a passenger train before reaching his destination. Carlson, who accompanied the deceased, testified that they visited the saloon mentioned in the pleadings about fifteen minutes before 6 o'clock, where each took a drink of whiskey. They then left the saloon for the purpose of making their purchases, in which they were engaged from twenty to thirty minutes, when they returned to the saloon and took a second drink of whiskey. They remained there, in the language of the witness, "talking and fooling around" until a few minutes before 9 o'clock, when, being admonished by the clerk in the grocery store that he was about to close for the night and to go and get the goods purchased by them, the deceased requested the witness to get the groceries and take them to the hand-car, which the latter did, remaining at or near the car until the arrival of the deceased, nearly two hours later. After their return to the saloon from the grocery store the deceased, in addition to the two drinks of whiskey, drank three or four glasses of beer. Mr. Birch, an employe in the freight office at Kearney, testified that he met the deceased about 11 o'clock, at which time the latter was drunk and staggered constantly

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while assisting Carlson to put the hand-car on the track, and that he, witness, warned him not to start ahead of the passenger train which was due in about ten minutes. An inquest was held under the direction of the coroner the following day, at which Cornelius, the proprietor, testified that the deceased drank beer in his saloon the night of his death, and purchased a bottle of liquor which he carried away. Dr. Humphreys, the coroner who examined the person of the deceased, found thereon a broken bottle which had recently contained whiskey. John Campbell, proprietor of a saloon on the same street and directly opposite that of the plaintiff in error Cornelius, testified that deceased visited his saloon the night of his death and appeared to the witness to be then intoxicated. On the other hand, Mr. Downing, the barkeeper, testified that the deceased drank nothing in the saloon of plaintiff in error Cornelius that night and was apparently sober when he left. Messrs. Walker, Toole, and Barnes, who saw him in the saloon about the time he left, testified that he appeared to be sober, while Mr. Hawkins testified that he drank two or three and maybe four glasses of beer with the deceased in the saloon of plaintiff in error Cornelius that night, and assisted him to put the hand-car on the track, but that he, deceased, "wasn't excited by drink or anything of that kind."

The question at issue was whether Cornelius in person or by his servants furnished to the deceased intoxicating liquor on the night in question which caused or contributed to the result stated. (*McClay v. Worrall*, 18 Neb., 44; *Jones v. Bates*, 26 Neb., 693; *Elshire v. Schuyler*, 15 Neb., 561.) That the evidence adduced by the plaintiffs below tends to establish the affirmative of that issue cannot be doubted. It is not the province of this court to critically weigh the evidence. That is a function of the jury under the instruction and guidance of the trial judge; and a verdict or finding will not be disturbed on account of a mere difference of opinion between this court and the jurors who

personally saw and heard the witnesses, and are therefore better qualified to judge of their credibility. Such is the rule universally recognized in appellate proceedings, and is without doubt applicable to the facts of this case.

Another objection argued under this assignment is that the evidence is not responsive to the allegations of the petition, which, after charging the sale of liquor to Hultman, in consequence of which the latter became intoxicated, concludes as follows: "The said Gust Hultman * * * while on his way home was overtaken by one of the trains of the Union Pacific Railroad Company, and because of his drunken and intoxicated condition he was unable to alight from said hand-car and was struck by said railroad train," etc. In addition to the evidence above summarized, Carlson, who was with the deceased on the hand-car, testified that he jumped the instant he saw the head-light of the engine, and had barely touched the ground when the collision occurred. There is no evidence that the deceased saw the approaching train or was aware of its presence until Carlson cried, "Jump, the train is on us!" The witness was further interrogated as follows:

Q. Did he jump?

A. No.

Q. What happened?

A. I do not know, because as I touched the ground the engine struck the hand-car."

The point made on this record is that the fatal injury was occasioned, not by the inability of the deceased to alight from the hand-car, but on account of his failure to observe the train; or, to state the proposition in the language of counsel for plaintiffs in error, "The real question is, was Hultman incapacitated by liquor to such an extent that by reason thereof he was unable to escape the danger that was upon him, or is it a fact that he was not apprised of the danger until too late to escape?" We are unable to perceive the force of this reasoning. That the deceased was

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unable to safely alight from the hand-car after he observed the passenger train is conceded by the plaintiffs in error, and satisfactorily established by the evidence of Carlson; and whether his incapacity was a physical one, or was due to mental obtuseness which rendered him insensible to the peril confronting him until too late to make his escape, cannot be regarded as material, provided the primary or responsible cause thereof was the intoxication alleged.

The next assignment is the giving of instruction No. 8^{*} by the court on its own motion as follows:

"If you find from the evidence that the deceased was under the influence of intoxicating liquors, furnished in whole or in part by the defendant Cornelius, at the time of his death, and that because of such intoxication he was unable to exercise the care and precaution he otherwise would have done, and that because of such intoxication he was unable or did not get off of the hand-car and out of the way of the approaching train, then the defendants would be liable, notwithstanding the railroad may also have been guilty of negligence.

"It is not material in this action whether the employes of the railroad were negligent or not, or whether or not the railroad company is liable for damage, if any, sustained by the plaintiffs; the question for you to determine is, whether the deceased was intoxicated at the time of his death, and whether the defendant Cornelius furnished the intoxicating liquors, or some part thereof, and whether in consequence of such intoxication he lost his life."

The objection to the first paragraph of this instruction is that it is unwarranted by the pleadings or proofs, there being no allegation that the deceased was intoxicated to such a degree that he was unable to exercise the care essential to insure his safety. Substantially the same objection was noticed under the preceding assignment. It is only necessary to add that on the record presented the trial court was fully warranted in submitting to the jury the question

stated, and that the finding is not so decidedly against the weight of the evidence as to call for interference in this proceeding.

The objection to the second paragraph should be considered in connection with instruction No. 4 requested by defendants below, viz.:

“If the negligence of the railroad company contributed to the death of the deceased, so that you cannot say that the deceased would have been killed but for such negligence, you will find for the defendant, although you may further find that the defendant Cornelius sold liquor to the deceased, which the deceased drank, and that the deceased was drunk at the time of his death.”

The contention with respect to this branch of the case is that the negligence of the railroad company contributed to the death of the deceased and for which it might be answerable in a proper proceeding, is a sufficient defense to the cause of action here alleged. A sufficient answer to that claim is that it is entirely unsupported by the answer which is in the form of a general denial. But the fallacy of that argument is apparent also when viewed in the light of common law principles without any reference to the liability of a saloon-keeper under our statute. In *St. Joseph & G. I. R. Co. v. Hedge*, 44 Neb., 448, decided at the present term, it was said that when subsequent to the alleged wrongful act a new and independent cause has intervened sufficient of itself to stand as the cause of the injury, the original cause will be deemed too remote to be made the basis of a recovery. But where the evidence discloses a succession of events so linked together as to make a natural whole, and all so connected with the first event as to be in legal contemplation the natural result thereof, the latter will be deemed the primary cause. The most that can be claimed for the evidence bearing upon the subject is that while the trainmen may have been negligent in not discovering the hand-car on the track, the primary

St. Joseph & G. I. R. Co. v. Hedge.

cause of the collision was the reckless conduct of the deceased in starting on the hand-car ten minutes before the fast train was due to leave Kearney. The instruction of the court was on the facts of the case proper, and that asked by the plaintiffs in error was rightly refused. But the ruling assigned must be sustained for another reason. Under the provision of our statute it is not necessary in an action of this character to prove that the liquor furnished by the defendant was the sole or even the principle cause of the injury alleged. (See cases above cited.)

Evidence was offered and rejected tending to prove that the defendant in error, Mrs. Hultman, had settled with the railroad company and received thereby satisfaction for the death of her husband. That ruling was certainly right for the reason, as we have seen, that the evidence offered was not responsive to any issue of the pleadings.

It is also alleged that the court erred in denying the plaintiffs in error leave to amend their answer so as to charge settlement with the railroad company. But that assignment is unsupported by any evidence of such a request or refusal.

There are other assignments in the petition in error, but they are not mentioned in the brief of counsel, and, following the settled practice of this court, will not be noticed in this opinion. We find no error in the record and the judgment must be

AFFIRMED.

**ST. JOSEPH & GRAND ISLAND RAILROAD COMPANY V.
EVA HEDGE.**

FILED APRIL 4, 1895. No. 6310.

1. **TORTS: SUBSEQUENT ACT.** Where in an action sounding in tort it is shown that subsequent to the alleged wrongful or negligent act a new and independent cause has intervened sufficient of it-

self to stand for the cause of the injury, the former will be held too remote to be made the basis of a recovery.

2. ———: ———: To have such an effect, however, the intervening cause must be one not procured by the original wrongful act or omission. Where the evidence discloses a succession of intermediate events, each dependent upon the one immediately preceding it, and all depending upon such original act, the latter is, in legal contemplation, the primary cause of the resultant injury.
3. ———: ———: QUESTION FOR JURY. Whether the natural connection of events is maintained or interrupted by the introduction of a new and independent cause is usually a question of fact and not of law.
4. **Railroad Companies: INJURY TO PASSENGER: BURDEN OF PROOF.** It is sufficient under the provisions of section 3, article 1, chapter 72, Compiled Statutes, in an action to recover for injuries received by the plaintiff while a passenger on a railroad train in this state, to prove that such injuries resulted from the operation and management of the road. The law infers negligence from the fact of the injury and imposes upon the railroad company the burden of proving that the case is within one of the exceptions mentioned in the statute.
5. **Carriers: NEGLIGENCE: PERSONAL INJURIES.** A common carrier of passengers is liable for personal injuries to passengers produced by the concurrent negligence of its servants and third persons.
6. ———: ———: ———. Independent of the statutory rule, a passenger who is placed in a position of apparent imminent peril through the negligence of a carrier may recover for injuries received while endeavoring to escape in obedience to the natural instinct of self-preservation, provided he exercise ordinary prudence in view of the circumstances, as they appear to him at the time.
7. ———: ———: ———. And such is the rule, although it subsequently appear that the danger was apparent only, and not real, since the carrier, whose negligence is the proximate cause of the injury, cannot complain on the ground that passengers err in their estimate of the danger confronting them or the choice of means to insure their safety.
8. ———: ———: EVIDENCE. Under an allegation that "the braking apparatus of said car * * * was in bad repair, the brake chain broken, and said brake useless for the purpose of stopping

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said car or controlling its movements," *held* not to disclose such a relation of the chain mentioned to the braking apparatus as to warrant the inference that the escape of the car resulted from that cause alone, and that it was not error to receive evidence tending to prove that the brake rod was broken and useless.

9. **Witnesses: LEADING QUESTIONS: REVIEW.** While a party will not ordinarily be permitted to lead his own witness, that rule has especial application to the trial court, which may for sufficient cause permit leading questions, and its action in that regard presents no ground for reversal in the absence of a clear abuse of discretion.
10. **Damages: MENTAL SUFFERING.** Mental and bodily suffering is incapable of measurement by any fixed and arbitrary rule, but must from its nature depend largely upon the judgment of the jury, governed by the circumstances of each particular case.
11. **Carriers: NEGLIGENCE: PERSONAL INJURIES: DAMAGES.** The plaintiff below jumped from a moving train in order to escape a threatened collision with a runaway freight car due to the negligence of the defendant. In jumping she severely injured her left ankle and was unable to sleep on account of pain for seventy hours, was confined to her bed three weeks, and unable to walk without the assistance of crutches for five months. A surgeon who examined the injured limb the following day testified that from the crepitus or grating sound observable on moving and pressing upon the ankle there was an evident fracture of the astragalus or ankle bone. At the time of the trial three years later her ankle was still enlarged and extremely sensitive, with partial ankylosis or permanent stiffness of the joint, and evidence tending to prove that such condition, including present lameness, would be of long duration and probably permanent. *Held*, That a verdict of \$3,000 is not excessive.

ERROR from the district court for Clay county. Tried below before HASTINGS, J.

The facts are stated in the opinion.

M. A. Reed, W. S. Prickett, and L. P. Crouch, for plaintiff in error:

When the injury happened the persons through whose instrumentality it was inflicted must have been engaged

in doing an act for the person sought to be charged with liability. (Wood, Law of Master & Servant, sec. 281; *Roddy v. Missouri P. R. Co.*, 104 Mo., 246; *Hitte v. Republican V. R. Co.*, 19 Neb., 620; *Meyer v. Midland P. R. Co.*, 2 Neb., 319; *Stevenson v. Chicago & A. R. Co.*, 18 Fed. Rep., 493.)

If subsequent to the original wrongful or negligent act a new cause has intervened of itself sufficient to stand as the cause of the misfortune, the former act or cause must be considered too remote. (*Mire v. East Louisiana R. Co.*, 7 So. Rep. [La.], 473; *Stanton v. Louisville & N. R. Co.*, 8 So. Rep. [Ala.], 798; *Pease v. Chicago & N. W. R. Co.*, 20 N. W. Rep. [Wis.], 908; *McClary v. Sioux City & P. R. Co.*, 3 Neb., 44; Wharton, Law of Negligence, secs. 134, 438; *Schmidt v. Mitchell*, 84 Ill., 195; *Tweed v. Mutual Ins. Co.*, 7 Wall. [U. S.], 44; *Chicago, B. & N. R. Co.*, 46 N. W. Rep. [Minn.], 76.)

The defendant in error was without legal justification in exposing herself to the hazard of jumping from the moving train. (*Coulter v. American M. U. Express Co.*, 56 N. Y., 585; *Gulf, C. & S. F. R. Co. v. Wallen*, 65 Tex., 568; *Chicago, R. I. & P. R. Co. v. Felton*, 33 Am. & Eng. R. Cas. [Ill.], 533; *Kleiber v. People's R. Co.*, 107 Mo., 240; *Gumz v. Chicago, M. & St. P. R. Co.*, 10 N. W. Rep. [Wis.], 13.

It is error to introduce evidence of carelessness and negligence not pleaded, as it introduces an issue not raised by the pleadings. Having specifically alleged certain acts of negligence, proof of others was error. (*Ravenscraft v. Missouri P. R. Co.*, 27 Mo. App., 617; *Waldhier v. Hannibal & St. J. R. Co.*, 71 Mo., 514; *Schneider v. Missouri P. R. Co.*, 75 Mo., 296; *Alabama G. S. R. Co. v. Richie*, 12 So. Rep. [Ala.], 612.)

The damages assessed by the jury are excessive. (*Klein v. Jewett*, 26 N. J. Eq., 474; *Tuttle v. Chicago, R. I. & P. C. Co.*, 42 Ia., 518; *Northern C. R. Co. v. Mills*, 16 Md., 355;

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Wyandotte v. Agan, 37 Albany L. J., 38; *Fuller v. Naugatuck R. Co.*, 21 Conn., 557; *Baltimore C. P. R. Co. v. Kemp*, 61 Md., 74; *City of Atlanta v. Martin*, 13 S. E. Rep. [Ga.], 805; *Smith v. City of Des Moines*, 51 N. W. Rep. [Ia.], 77; *Girard v. St. Louis Car Wheel Co.*, 46 Mo. App., 79; *Wesley v. Chicago, St. P. & K. C. R. Co.*, 51 N. W. Rep. [Ia.], 163; *City of La Salle v. Porterfield*, 38 Ill. App., 553; *Buck v. People's S. R. & E. L. & P. R. Co.*, 18 S. W. Rep. [Mo.], 1090.)

Thomas Ryan and Epperson & Sons, contra:

A railroad company is liable for an injury sustained by a passenger in leaping from a train, although if he had remained in the cars he would have been uninjured, if the leaping was rendered an act of reasonable precaution on such passenger's part on account of his perilous position through the fault of the company or its servants. (*Lincoln Rapid Transit Co. v. Nichols*, 37 Neb., 332; *Southwestern R. Co. v. Paulk*, 24 Ga., 356; *Buel v. New York C. R. Co.*, 31 N. Y., 314; *Caswell v. Boston & W. R. Corp.*, 98 Mass., 194; *Twomley v. Central Park, N. & E. R. R. Co.*, 69 N. Y., 158; *Galena & C. U. R. Co. v. Yarwood*, 17 Ill., 509; *Schultz v. Chicago & N. W. R. Co.*, 44 Wis., 638; *Missouri P. R. Co. v. Baier*, 37 Neb., 235; *Galena & C. U. R. Co. v. Fay*, 16 Ill., 558.)

The verdict is not excessive. (*Illinois C. R. Co. v. Barron*, 5 Wall. [U. S.], 90; *Heucke v. Milwaukee City R. Co.*, 34 N. W. Rep. [Wis.], 243; *Atchison, T. & S. F. R. Co. v. Moore*, 31 Kan., 197; *Quinn v. Long Island R. Co.* 34 Hun [N. Y.], 331; *Rockwell v. Third Avenue R. Co.*, 64 Barb. [N. Y.], 439; *Funston v. Chicago, R. I. & P. R. Co.*, 61 Ia., 452; *Hinton v. Cream City R. Co.*, 65 Wis., 323; 3 Sutherland, Damages, p. 730; *Gale v. New York C. & H. R. R. Co.*, 76 N. Y., 595.)

Post, J.

On the 2d day of January, 1890, the defendant in error Mrs. Hedge, at the city of Fairfield, purchased of the plaintiff in error, the St. Joseph & Grand Island Railroad Company (hereafter called the "railroad company") a ticket good from the station above named to the city of Hastings and took passage on a west-bound freight train which was also accustomed to carry passengers between said stations. When the train in question had reached a point about one mile east from Hastings a stop was made for the purpose of taking on a car loaded with brick then standing on a side track constructed for the accommodation of the proprietor of the brick yards there located. In order to take on the car mentioned, the train was cut so as to leave the caboose and one or two freight cars east of the switch connecting the side track with the main line. The side track is constructed on a grade which inclines toward the main line, so that cars left thereon unsecured will by force of gravity alone run down to and upon the main track. To prevent this a safety switch had been constructed in connection with the side track so arranged that when left open it served to disconnect the siding from the main track, and cars coming down the grade from the brick yards would accordingly be run onto what is known as a spur instead of the main track. But when closed, said switch served to connect the rails of the siding, thus making a continuous track from the brick yard to the main line. In order to take on the car of brick it was necessary for the men in charge of the train to move a partially loaded car standing in front thereof. This was accomplished by pulling the two cars mentioned onto the main track and, after coupling the loaded car into the train, pushing the other back onto the siding and blocking the wheels thereof with billets of wood in order to keep it in position. It seems that the point where the last named car was left was too far

above the brick-kiln to enable the yardmen to complete their task of filling it. The latter thereupon undertook to move it down the track to its proper place, when it was discovered that the brake rod thereof was broken and dragging so that it was impossible to hold the car in position by that means, and the billets of wood referred to, one four by four and the other two by four inches, proved insufficient for that purpose. In consequence thereof the car escaped from the men in charge, and the safety switch above mentioned, being still closed, it followed the siding onto the main track with the result hereafter stated. While the conductor and brakeman were engaged in an attempt to lock the switch connecting the main track with the siding, the former discovered that the brick yard men were unable to control the car, and that a collision was imminent on account of their inability to close the switch (the lock being out of order), gave the signal to pull up. His signal seems to have been recognized and obeyed by the engineer, since the train was started and so nearly cleared the switch that the wild brick car merely struck the iron bar or hand rail at the end of the caboose. There were at that instant three men in the overhead lookout of the caboose, and who were evidently watching the brick car approaching the switch, as indicated by the following quotation from the testimony of Mrs. Hedge, who is strongly corroborated by other witnesses:

Q. What first attracted your attention to this car of brick?

A. The first was from hearing remarks made in the caboose by different parties relative to this car.

Q. What was said?

Objection. Overruled. Exemption.

A. The first is "That is a dangerous switch."

Q. What else, if you remember?

A. That the car was going to get away from the old man; that he could not handle it. * * *

Q. What else do you remember being said there about this matter?

A. That there was danger, and we had better be getting out of there. * * * I heard that first from the lookout.

Q. Did they [the men in the lookout] get down when they made the remark about getting out?

A. Yes, sir.

Q. Where did they go, if any place?

A. They went out.

Q. In what manner?

A. Hurriedly.

Q. What remarks did you hear from others as they went out?

Objected to, as incompetent, irrelevant, and immaterial. Overruled. Exception.

A. I heard the remark outside, "Jump for your lives."

* * *

Q. Whom was that remark addressed to, if you, as you understood it?

A. To ourselves.

Q. What were the parties in the lookout doing when that remark was made?

A. They were getting out through the narrow passageway. * * *

Q. What did they do when they reached the platform?

A. I suppose they jumped, but did not see them.

Q. Was the car in motion at that time?

A. Yes, sir.

Q. Where did you find those parties when you reached the platform?

A. On the ground.

Q. In what positions?

A. They were lying down. I cannot say just what position.

Q. They were not upright?

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A. No, sir; they were not standing up.

Q. Who was with you at the time?

A. Mrs. Dinsmore.

Q. What did she do?

A. She jumped out from the train just ahead of me.

* * *

Q. What happened to you when you jumped?

A. I do not know.

Q. What is the first thing you can recollect?

A. The first thing I can remember is they were gathering around me and I was trying to get up.

The following is a quotation from the testimony of Mrs. Dinsmore:

Q. What was the condition of the caboose in that respect at the time of the speaking of the remark? [Referring to the character of the switch.]

A. It was standing still.

Q. What occurred afterward?

A. The engine started up so quickly that I nearly fell on the stove. I took my seat, and just as I took my seat some one in the look-out said (Objection. Overruled. Exception.): "That car will get away from that old man. We had better be getting out of here. Every one run and jump quick." * * * There were some in the lookout, I know, that ran and jumped.

Q. Were they men or women?

A. They were men. * * *

Q. What occurred when you reached the platform on the end of the car?

A. I turned before I got out on the platform to see if Mrs. Hedge was coming, and when I got to the platform I jumped. I did not see Mrs. Hedge again until I found her on the ground.

Q. What, if anything, did you hear in the way of directions as to what to do?

A. I was told to hurry up quick.

Q. At the time this was said what were the other passengers doing?

A. They were getting out as fast as they could.

And Mr. Morris, who was at the time employed at the brick yards, testified that the direction "jump for your lives" was given by a brakeman at the rear end of the caboose.

The injury, which is the foundation of this action, was, as will be perceived from the evidence above quoted, received by Mrs. Hedge in jumping from the caboose, and the questions presented all relate to the liability of the railroad company therefor.

We will first notice the assignment relating to the agreement between the railroad company and Hurley, the proprietor of the brick yards, under which the side track and switches were constructed. The offer was to prove that said tracks were graded by Mr. Hurley, the company merely furnishing the rails and ties; that they were constructed for the exclusive use and accommodation of the former, that cars were delivered to him on said track whenever demanded and were, while they remained thereon, under his exclusive control. The evidence so offered was excluded on the objection of the plaintiff below, and the ruling thereon is one of the grounds assigned in the motion for a new trial as well as in the petition in error. The contention of the railroad company with respect to that question is best illustrated by a quotation from its brief, viz.: "If Hurley's men had not meddled with the car at the inopportune time, the accident would not have happened. * * * The car would have stood there securely blocked with wood under its wheels till doomsday and injured no one. * * * The defective brake cannot in law be considered the proximate cause of the accident. The rule is that if subsequent to the original wrongful or negligent act a new cause 'has intervened sufficient of itself to stand as the cause of the misfortune the former act or cause must be considered too remote.'"

The rule thus invoked is an ancient and salutary one, but cannot be said to be applicable to the admitted facts of the case before us. The question in all such cases is whether the facts shown constitute a continuous succession of events so linked together as to make a natural whole, or was there a new and independent cause intervening between the wrong and the injury. The intervening cause must be one not produced by the alleged wrongful act or omission, but independent of it, and adequate to produce the result in question. There may be, it is evident, a succession of intermediate causes, each dependent upon the one preceding it and all so connected with the primary cause as to be in legal contemplation the proximate result thereof. The foregoing proposition is exemplified by the following authorities: *Ray*, Negligence of Imposed Duties, 699; *Milwaukee & St. P. R. Co. v. Kellogg*, 94 U. S., 469; *Purcell v. St. Paul City R. Co.*, 48 Minn., 134; *Mahogany v. Ward*, 16 R. I., 479. Whether the natural connection of events is maintained or broken by the intervention of a new and independent cause is, according to the authorities cited, a question of fact. Therefore, assuming the act of the yard men to have been the immediate cause of the injury, the question whether such act naturally resulted from the negligent leaving of the car at a point above the brick-kiln and the neglect of the trainmen to open the safety switch was properly submitted to the jury. The suggestion that cars, while on the side track, are under the exclusive control of Hurley, the proprietor of the brick yard, and that the railroad company is accordingly not liable for the alleged negligent acts, is not entitled to serious consideration. The relation of carrier and passenger existed at the time of the injury, and the duty imposed upon the former was to safely carry the latter, subject to the conditions named in the statute. (Sec. 3, art. 1, ch. 72, Comp. Stats.) In *Missouri P. R. Co. v. Baier*, 37 Neb., 235, and in *Union P. R. Co. v. Porter*, 38 Neb.,

226, it was held sufficient for one who has received personal injuries while a passenger on any line of railroad in this state to prove that such injury resulted from the operation or management of the said road, and that the law will presume negligence from that fact alone. The direct and immediate cause of the injury charged was the exposing of the passengers on the caboose to the peril of collision with the wild freight car by means of the open switch. If the railroad company negligently exposed the plaintiff below to danger in the manner indicated, and which resulted in the injury alleged, the fact that the escape of the freight car was in nowise attributable to its negligence must, in view of the statute above cited, be regarded as immaterial. The same result is reached also by another and more direct course of reasoning, viz., the offer was in effect to prove that the injury complained of resulted from the concurrent negligence of the defendant railroad company and Hurley, a stranger, and is therefore directly within the principle recognized in *Pray v. Omaha Street R. Co.*, 44 Neb., 167.

We will next examine the assignment relating to the sufficiency of the evidence. The only additional testimony which calls for notice in this connection is that of Mr. Swearingen, the conductor, who was at the time of the injury evidently near the rear end of the caboose, and substantially corroborates the other witnesses respecting the hurried exit of the passengers. He also heard one of them, Mr. Furrer, addressing the others, say to get off the car. Said witness testified, however, that the caboose had cleared the switch at the time Mrs. Hedge jumped therefrom, and that there then existed no danger of a collision with the freight car. From the facts thus stated it is argued that in jumping from the moving train the plaintiff below was guilty of contributory negligence within contemplation of the statute, and which amounts to a defense in this action. But to that proposition we cannot give our

assent. In *Omaha & R. V. R. Co. v. Chollette*, 33 Neb., 143, and *Chicago, B. & Q. R. Co. v. Landauer*, 36 Neb., 642, it was held not such negligence to jump from a moving train as will in every instance defeat a recovery under our statute. But independent of the statutory rule, a passenger placed in a position of apparent imminent peril through the negligence of the carrier may recover for injuries received while endeavoring to escape in obedience to the natural instinct of self-preservation, provided he exercises ordinary prudence in view of all of the circumstances of the case; and such is the rule, although it subsequently appears that no actual danger existed. (*Lincoln Rapid Transit Co. v. Nichols*, 37 Neb., 332, and cases cited.) The scene at and immediately preceding the injury was apparently one of confusion and terror. The hurried exit of the men who were watching the runaway car from the lookout, and the cry "Jump for your lives!" accompanied by the sudden starting of the train, when regarded from the standpoint of the plaintiff below, certainly tend to establish reasonable ground for the apprehension of imminent peril; and the railroad company is in no position to complain on the ground that she erred in her estimate of the danger confronting her, or the choice of means to insure her safety.

Exception was taken to the admission of evidence by the plaintiff below as to the condition of the broken rod of the runaway freight car and which tends strongly to prove that said rod was broken and useless for the purpose of controlling the car. The ground of the objection is that said evidence is immaterial under the issues. The allegation of the petition is: "The braking apparatus of said car at the time and before it was placed on said side track was in bad repair, the brake chain thereon broken, and said brake was useless for the purpose of stopping said car or controlling its movements." True, the broken rod is not specifically mentioned in the pleadings, but the allegation that the braking apparatus was in bad repair and useless for

the purpose of controlling the car is a sufficient foundation for the proof. Had the petition disclosed such a relation of the chain mentioned to the braking apparatus as to warrant the inference that the escape of the car resulted from that cause alone, a different question might have been presented; but the allegation quoted is not such as, by any natural construction, to exclude defects other than that above named.

Exception is also taken to the admission of testimony tending to prove that it was the duty of the trainmen to open the safety switch after pushing the freight car onto the side track, but a reference to the record shows that the only objection urged to the questions mentioned is that they are leading and suggestive. A party will not, as a general thing, be permitted to lead his own witnesses, but the rule in that regard is especially applicable to the trial court, and the subject is so far a matter within the discretion of the court as to present no ground for reversal in the absence of a clear abuse of discretion. (*St. Paul Fire & Marine Ins. Co. v. Gotthelf*, 35 Neb., 351.)

Lastly, it is argued that the damage, \$3,000, is excessive, and that the verdict should have been set aside on that ground. Mrs. Hedge, according to the undisputed evidence, was, as the result of the injury, confined to her bed for three weeks, and was unable to walk without the assistance of crutches for nearly, if not quite, five months. For seventy hours after the injury she was unable to sleep on account of pain, and was, at the time of the trial, in March, 1893, unable to use or bend her left ankle without considerable pain. Dr. Prentiss, an experienced surgeon, who made a careful examination of her limb on the day of the accident or the day following, testifies to a severe sprain of the ligaments, and that from the crepitus or grating sound observed when moving and pressing upon the ankle there was an evident fracture of the astragalus or ankle bone, and that in his opinion her present lameness will be

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of long duration, if not permanent. Dr. Steel, who examined the limb in September, 1892, found the ankle swollen and enlarged, with partial ankylosis or permanent stiffness of the joint. It was also extremely painful and sensitive to the touch. On the second examination a few days before the trial the witness observed the same condition of the ankle, except that the swelling and tenderness were less pronounced. He states as his conclusion that the limb, in all probability, will never be restored to its normal condition. On the other hand, Dr. Neville and Dr. Gilbraith, who examined the injured limb in January or February, 1891, about twelve months after the accident, testify to a severe sprain, but discovered no evidence of a fracture of the astragalus. It has been frequently said by this court that mental or bodily anguish is incapable of measurement by any fixed and arbitrary rule, but from its nature must depend largely upon the judgment of the jury, based upon the circumstances of the particular case. Judged by that rule the verdict cannot be said to be so decidedly against the weight of the evidence as to call for interference in this proceeding. The judgment must accordingly be

AFFIRMED.

RYAN and RAGAN, CC., not sitting.

JOHN FITZGERALD, FOR HIMSELF AND ON BEHALF OF
ALL OTHER STOCKHOLDERS OF THE FITZGERALD
& MALLORY CONSTRUCTION COMPANY, APPELLANT,
V. FITZGERALD & MALLORY CONSTRUCTION COM-
PANY AND THE MISSOURI PACIFIC RAILROAD COM-
PANY, APPELLEES.

FILED APRIL 4, 1895. No. 5309.

1. **Corporations: LIABILITY FOR TORTS OF OFFICERS.** The term "scope of authority," as used in the law defining the liability of corporations for the tortious acts of their officers and agents, is not susceptible of a precise definition, but is limited to acts in some way incident to the employment and duties of such agents and having some relation to the obvious purpose of their appointment.
2. ———: ———: **SALE OF BONDS: CONSTRUCTION COMPANY.** A railroad company delivered to a construction company its bonds which had been earned by the latter in building certain lines of road. Afterward the directors of the construction company, a majority of whom were officers of the railroad company or controlled by it, voted to sell said bonds, then worth their face, to the stockholders of the construction company *pro rata*, according to the number of shares held by each, at a discount of ten per cent. The minority stockholders not being able to take and pay for the amounts thereof allowed to them, bonds were by a subsequent resolution disposed of at the same rate to the directors interested in the railroad company. No part of the proceeds thereof were returned to the last named company nor did it profit in any way by the transaction. *Held*, In an action by the minority stockholders of the construction company against the railroad company for an accounting, that the action of the directors named in disposing of said bonds at a discount was not within the scope of their authority as officers of the last named corporation and that said company is not liable for the loss thereby occasioned.
3. ———: ———: ———: ———. The fact that such bonds may have been withheld for a considerable time after they were earned by the construction company, to the damage of the latter in the loss of promised subsidies and prospective profits, although actionable in the proper proceeding, will not render the rail-

44	463
44	770
44	463
45	52
44	463
47	416
48	356
48	387
44	463
51	658
55	582
44	463
62	400

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road company liable for loss by reason of the negligent or corrupt action of the directors of the last named company in disposing of said bonds for less than their value.

4. **Damages.** In all actions for damages the wrong done and the injury sustained must bear toward each other the relation of cause and effect, and the damages must be the natural and proximate consequence of the act complained of.
5. **Corporations: OFFICERS: CONSPIRACY: RATIFICATION.** *Held*, (1) From an examination of the evidence, that the loan to the construction company of \$2,500,000 of the bonds of the railroad company by the president of the latter was a personal transaction in which said corporation was in nowise interested, and not made in pursuance of a conspiracy to which it was a party, having for its purpose the wrecking of a construction company; (2) that the last named company ratified said transaction by receiving and appropriating the bonds, and subsequently paying interest thereon with the knowledge and consent of all the stockholders.
6. **Contracts: PLEADING.** The illegality of an agreement, unless disclosed by the pleadings or proofs of the party claiming through it, must, in order to be available to the adverse party, be specially pleaded.
7. **Public Policy: CONTRACTS.** Agreement examined in the light of the evidence, and *held* not void as against public policy.
8. **Payment.** A debt will not be extinguished by the payment of a less sum than the amount actually due, unless based upon a new and sufficient consideration.
9. **Release and Discharge: CONSIDERATION.** The settlement of a doubtful or disputed claim is generally a sufficient consideration for a compromise; but in order to have such effect it is essential that there be in fact a dispute or doubt of the rights of the parties. An arbitrary refusal to pay, based on the mere pretense of the debtor, made for the obvious purpose of exacting terms which are inequitable and oppressive, is not such a dispute as will of itself support a compromise resulting in a reduction of the amount of his indebtedness.
10. **Corporations: CONTRACTS BY DIRECTORS WHO ARE MEMBERS OF TWO RIVAL COMPANIES: VALIDITY.** Persons who are directors of two corporations have no implied authority to bind either by contracts with respect to subjects in which their interests are adverse; and all such agreements, unless subsequently ratified, may be avoided at the suit of non-consenting stockholders.

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11. **Equity: RESCISSION: DURESS.** When money is paid or concessions exacted through necessity in order to obtain property illegally withheld, where its detention is accompanied by immediate hardship or irreparable injury, such transaction may be avoided on the ground of compulsion, although perhaps not amounting to a technical duress.
12. **Principal and Agent: RATIFICATION.** Acquiescence by a principal in the fraudulent or unauthorized act of his agent is in effect a new agreement made with an intent to condone the wrong done, and will not be inferred from doubtful evidence, but should be established like any other material fact, by the party asserting it.
13. **Equity: RESCISSION: LACHES.** Mere lapse of time, unaffected by other circumstances, will not bar the right to rescind a voidable transaction, since it is not for a wrong-doer to impose extreme vigilance or promptitude as conditions to the exercise of the rights of the injured party.
14. ———: ———: ———: **EVIDENCE.** But the failure of the injured party to object after knowledge of the wrong is evidence of ratification, and may, especially when long continued, be sufficient of itself to warrant a finding for the party alleging such fact.
15. **Parties: OBJECTIONS.** Objection on account of the absence of parties who are not indispensable to a determination of a controversy should be made by answer or demurrer, otherwise the court may determine the rights of the parties before it.
16. **Removal of Causes.** The courts of this state will not examine an order of the circuit court of the United States remanding a cause for want of jurisdiction in order to determine whether such proceeding is in accordance with the practice of that court. Such an inquiry should be made only in the court by which the order is made.
17. **Receivers: GARNISHMENT.** It is no objection to the appointment of a receiver of a corporation, in an action by a stockholder for and accounting in its behalf against a corporation indebted to it, that the debtor corporation was summoned as garnishee of the first named corporation in an action against it by attachment, where the attachment proceeding has been abandoned and judgment entered for damage only, without any reference to the garnishee.
18. **Courts: JURISDICTION.** It is a rule recognized alike by state and federal tribunals that the court which first acquires juris-

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diction of the subject of an action will retain such jurisdiction until the final determination of the controversy.

19. **Amount of Decree.** *Fitzgerald v. Fitzgerald & Mallory Construction Co.*, 41 Neb., 374, so modified as to authorize a decree in favor of the plaintiff for \$300,906.33.

REHEARING of case reported in 41 Neb., 374.

Deweese & Hall and *J. M. Woolworth*, for appellant.

B. P. Waggener, *John L. Webster* and *A. R. Talbot*,
contra.

POST, J.

This cause was argued and submitted to us in the month of July, 1892; but leave to reargue was subsequently requested and allowed, and the cause assigned for hearing before the commissioners by whom were submitted the opinions heretofore filed. (See 41 Neb., 374-511.) A consideration of motions filed subsequent to the decision above mentioned having suggested a doubt of some of the propositions therein approved, a rehearing was ordered and the cause again submitted on its merits. It will be necessary on this hearing, for reasons which will hereafter appear, to notice but few of the many questions originally presented, and in the consideration of those our endeavor will be to apply well established principles of equity to the admitted facts of the case, rather than an analysis of the multitude of authorities cited in the numerous briefs and on the oral argument.

The result of our examination, it may be noted, is substantially in accordance with the views of the court as constituted at the time of the hearing first alluded to, although in justice to Mr. Commissioner RYAN it should be remarked that the different conclusion stated in the opinion mentioned was reached after consultation with the majority of the court and fairly reflects the views then entertained by us. It will

not be necessary at this time to state in detail the facts out of which this controversy arose, in view of the elaborate statements in the former opinions.

We will first notice the question presented by the claim of the plaintiff based upon the sale of the bonds of the Missouri Pacific Railway Company. Briefly stated, the facts are these: The construction company held certain bonds of the Missouri Pacific company which had been received by it in payment for the construction of certain roads in which the first named company had acquired a controlling interest and which to the amount of \$5,000,000 were, by resolution of the board of directors of the construction company sold to certain of its stockholders at a discount of ten per cent of their face value, resulting in an apparent net loss to the company of \$500,000. In this connection it should be remembered that the action is not against the favored stockholders for a misappropriation of the funds of the construction company, neither is it in form or substance an action to pursue property which in equity belongs to the company. That a corporation is entitled to recover against an unfaithful officer for the misappropriation of its funds is elementary law; and if, as alleged, the sale of the bonds was the consummation of a conspiracy on the part of George Gould, Russell Sage, and other directors, having for its ultimate object the wrecking of the construction company, they are, without doubt, answerable for their wrong when called upon for an accounting in an appropriate action. It may also be assumed, although the question is not necessarily involved in this hearing, that contracts whereby officers of a corporation realize large profits directly or indirectly at its expense are presumptively fraudulent and voidable at the election of the latter. But is the Missouri Pacific Railway Company answerable for the alleged wrongful act; and if so, upon what recognized principle of equity jurisprudence? It is not contended that the last named company was present, in a legal sense,

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participating in the sale of the bonds, or that it is the recipient of any of the profits derived from or on account of that transaction. If, therefore, it must account for the loss to the construction company by reason of the profligacy of the latter's officers, its liability depends upon other and different principles.

In order that the position of the plaintiff may not be lost sight of in the contemplation of the complex transactions involved, we copy here the brief but comprehensive summary of his argument prepared by the reporter accompanying the opinion heretofore approved: "The sale by the directors and purchase by the stockholders of the Missouri Pacific bonds at a discount was a fraud. Neither the directors nor the stockholders can buy or sell the property of a corporation for less than its value without rendering themselves and all concerned liable. Without the aid of the Missouri Pacific Company the fraud in the sale of the bonds could not have been accomplished. There was due to the construction company at the time it was forced to borrow from Gould \$2,500,000 in bonds the sum of \$3,170,000 in bonds of the Missouri Pacific Company. The latter company acted with its directors and the directors of the construction company, and the resolution under which the bonds were sold was for its benefit as well as others. It received part of the fruits of the conspiracy, and the wrong must be viewed as a whole. By conspiring together for the purpose alleged the conspirators assumed to themselves the attributes of individuality in the prosecution of the common design, thus rendering what was done by each in the execution of such design the act of all." And on the argument it was said that the Missouri Pacific Company, having been made the instrument of its officers and managers in the perpetration of the fraud upon the construction company, must be regarded as a wrongdoer, and jointly liable with the other conspirators. The evidence which is the foundation for that contention is in-

dicated by the twenty-eighth, twenty-ninth, fortieth, forty-first, forty-second, and forty-third findings of the district court, and which are here set out in full:

“(28.) The court further finds that at all times from the date of the organization of the Fitzgerald & Mallory Construction Company up to April 17, 1889, the plaintiff herein, John Fitzgerald, was a director of said construction company. That the directors of said company were five in number. That prior to November 3, 1886, a majority of said directors were friendly to the interests of the plaintiff. That since said 3d day of November, 1886, three of said five directors, together with the treasurer, have been directly or indirectly interested in the defendant railway company, have acted in the interest of said railway company in all matters concerning the management of said construction company, where the interest of the railway company and the construction company have come in conflict.

“(29.) The Missouri Pacific Railway Company failed to act in the authorization of the issuance of its bonds to pay over as provided in its contracts with the construction company until December 10, 1886, when, by its board of directors, it authorized the issuance of five million (\$5,000,000) dollars of Missouri Pacific five per cent trust bonds, and said bonds were issued in pursuance of said authorization under date of January 1st, 1887.”

“(40.) The court further finds that on the 28th day of July, 1887, at a meeting of the board of directors of the Fitzgerald & Mallory Construction Company, held at New York city, where were present Russell Sage, R. I. Cross, and Sidney Dillon, and absent S. H. Mallory and the plaintiff herein, it was resolved to sell four million (\$4,000,000) dollars Missouri Pacific railway five per cent bonds to the stockholders of the said construction company at ninety per cent of the face value, and Jay Gould, the president of the Missouri Pacific Railway Company, fur-

hundred thousand (\$2,500,000) of one million five hundred thousand bonds then possessed by the for the purpose of completing the the sale. That under said resolvers, with the exception of John Mallory, took their *pro rata* share of amount of three million two hundred dollars. That when informed of Fitzgerald and Mallory protested

July 28, 1887, the full amount of hundred thousand (\$2,500,000) dollars furnished by Jay Gould was due the from the defendant, the Missouri Railway, and the same should be treated as a loan to the Missouri Railway Company to the construction of said railway company should pay said Gould on account of said ad-

3d day of September, 1887, R. I. Fitzgerald, president of the construction company, paid from said company the sum of sixty-two thousand (\$62,000) dollars to Jay Gould on account of two million five hundred thousand bonds delivered to the construction company.

That the said sixty-two thousand dollars so paid is a proper charge on the Missouri Railway Company, and in favor of Fitzgerald & Mallory Construction Company in this allowed.

22d day of September, 1887, at a meeting of the Fitzgerald & Mallory Construction Company in New York city, where all of the stockholders were present, a sale of bonds in the amount of one million five hundred thousand (\$1,500,000) dollars

[not] already sold [was] ordered made to the New York stockholders of the Fitzgerald & Mallory Construction Company *pro rata*, said sale being made at ninety per cent of par value. That it was further ordered at said meeting of directors that one million five hundred thousand (\$1,500,000) dollars of Missouri Pacific bonds be distributed among the stockholders of the construction company as a declared dividend upon stock."

It may not be out of place to look behind the foregoing findings to the record upon which they are based, and which, so far as evidenced by the books of the construction company, is found in the minutes of three meetings of the board of directors. The first of said meetings was held in New York, July 28, 1887, those present being R. I. Cross, Russell Sage, and Sidney Dillon, and the record, or so much thereof as relates to the subject in hand, is as follows:

"Mr. R. I. Cross, member of the committee appointed to investigate the condition of the company, reported, in substance, as follows: That the company is indebted to its stockholders to the extent of \$1,500,000 for money borrowed; that it is indebted to the Missouri Pacific Railway Company \$772,856.27, and to Morton, Bliss & Co. to the extent of about \$600,000; that \$500,000 would be required to complete the company's contract with the Missouri Pacific Railway Company. And thereupon the following resolution was adopted:

"*Resolved*, That the treasurer is hereby instructed to sell a sufficient amount of the Missouri Pacific Railway Company's trust five per cent bonds at not less than ninety cents, to provide funds to pay for the amount borrowed, amounting to \$1,500,000 and interest; and that for the further purpose of the company the treasurer is authorized to sell further amounts of the same bonds at the same price to the extent of, say \$4,000,000 in all, to the shareholders, with the understanding that the prorated share of these

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bonds of any stockholder who is not prepared to take his share within ten days from this date shall be first offered to the other stockholders *pro rata*.

"On motion of Mr. Cross it was voted that the treasurer is hereby authorized to borrow from Mr. Jay Gould \$2,500,000 of the Missouri Pacific Railway Company's five per cent bonds, to be returned to him when the construction company receives the bonds due under its contract with the Missouri Pacific Railway Company."

At the second meeting, on September 20, 1887, the directors all being present with the exception of Sidney Dillon, the following appears:

"After full discussion by members of the board, it was, on motion by Mr. Cross, voted that the treasurer of this company be and hereby is authorized to sell \$2,000,000 of the Missouri Pacific Railway Company's five per cent bonds at ninety cents, to provide funds for the completion of the work of the construction company, and to give the stockholders *pro rata* the first option of buying the same. Mr. Cross also reported that Mr. Mallory's account showing the amount of money expended by himself and Mr. Fitzgerald previous to the execution of the contract was correct, and, on motion, they were given credit for that amount."

At the meeting of September 22, the following proceedings were had:

"NEW YORK CITY, September 22, 1887.

"Pursuant to call, meeting of the directors was held this day at No. 195 Broadway, New York.

"Present, S. H. Mallory, John Fitzgerald, Russell Sage, R. I. Cross, and Sidney Dillon.

"On motion of Mr. Dillon it was unanimously voted that the resolution passed at the last meeting of the directors providing for the sale of the Missouri Pacific Railway Company's five per cent bonds be amended so as to read as follows:

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“Resolved, That the treasurer of this company be and hereby is authorized to sell \$1,800,000 of the Missouri Pacific Railway Company’s five per cent bonds at ninety cents, to provide funds for the completion of the work of the construction company, and that said bonds be sold to the following stockholders of the company who were ready to buy the same, as follows:

Russell Sage.....	\$375,000
Morton, Bliss & Co.....	300,000
Jay Gould.....	675,000
H. G. Marquand	150,000
Sidney Dillon.....	150,000
George J. Gould.....	75,000
I. & S. Wormser	75,000
<hr/>	
Total.....	\$1,800,000”

The foregoing transactions do not include the \$1,500,000 of bonds earned and delivered to the construction company upon the completion of the first 150 miles of road. The last named installment had been previously disposed of to the apparent satisfaction of all concerned, and does not call for further mention on this branch of the case. Mr. Mallory, president of the construction company, on being advised of the action taken at the meeting of July 28, addressed to Mr. Cross, treasurer of the company, the following letter:

“WINFIELD, KAS., Aug. 3, 1887.

“*R. I. Cross, Esq., Treasurer F. & M. Const’n Co.*—
 DEAR SIR: When I left New York it was supposed that the bonds were negotiated at par, etc., and I am much surprised to be informed to take my allotment in ten days or have them sold at 90. I object to this. I have had to stand a ten per cent reduction on 150 miles, and now another ten per cent on the whole is more than I can stand.

“I hereby subscribe for \$400,000 five per cent Missouri Pacific bonds at 90, and will write to Mr. Gould to protect

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me. If he does not, I desire to make loan from you at six per cent interest and I will secure with bonds and construction stock, I paying up Mr. Gould.

“Yours truly, S. H. MALLORY.”

And referring to the subject of the above communication Mr. Mallory testified as follows:

Q. These \$2,500,000 were disposed of for the benefit of the company, were they not?

A. I suppose that the \$2,500,000 of bonds—that is a part of the \$4,000,000.

Q. In the sale and disposition of these bonds at a discount of ten per cent, and when the stockholders took those bonds at ten per cent discount, did the Missouri Pacific Railway Company get any benefit out of that deduction, to your knowledge?

A. Not that I know of, but its stockholders got the benefit.

Q. The discount of ten per cent went to the benefit of your associate stockholders, who availed themselves of the opportunity?

A. Yes, sir.

Q. And the Missouri Pacific Railway Company, so far as you know, was not a party to the sale and disposition of any of those bonds at a ten per cent. discount?

A. No, sir.

Q. But you and Mr. Fitzgerald could have had the same benefit as the other stockholders if you had been in a position pecuniarily to have availed yourselves of it?

A. Yes, sir.

The foregoing is substantially all of the facts in evidence tending to characterize the transactions involved, and upon which the liability of the Missouri Pacific Company, if answerable in this action, must depend.

As stated in the former opinion, corporations are liable civilly for damages occasioned by the torts of their officers and agents committed while acting within the scope of their

authority as such; but although that principle may be regarded as fundamental, its practical application to the varied transactions of our commercial life is by no means free from difficulty owing to the want of a precise definition of the term "scope of authority." We have been referred to no clearer exposition of the subject than that found in *Mechem, Agency*, 312, viz.: "But while, as has been seen, authority is often to be implied from the conduct of the parties, yet it is a necessary and logical limitation upon the construction of such an authority that the power implied shall not be greater than that fairly and legitimately warranted by the facts. The reason of this rule is so apparent and so just that it needs no argument to support it. If the agency arises by implication from acts done by the agent with the tacit consent or acquiescence of the principal, it is to be limited in its scope to acts of a like nature; if it arises from the general habits of dealing between the parties, it must be confined in its operation to dealings of the same kind; if it arises from the previous employment of the agent in a particular business, it is, in like manner, to be limited to that particular business. In other words, an implied agency is not to be extended by construction beyond the obvious purpose for which it is apparently created." In *Reynolds v. Witte*, 13 S. Car., 5, a very instructive case, it is said: "We must distinguish between the authority to commit a fraudulent act and the authority to transact the business in the course of which the fraudulent act was committed. Tested by reference to the intention of the principal, neither negligence nor fraud is within the scope of the agency, but tested by the connection of the act with the property is as much within the scope of the agency as negligence in allowing others to take it. The proper inquiry is, whether the act was done in the course of the agency and by virtue of the authority as agent. If it was, then the principal is responsible, whether the act was merely negligent or fraudulent."

We assume for the purpose of this inquiry that the proofs warrant, not merely a finding of fraud by Gould and his associates, but that such fraud was accomplished by means of a conspiracy on the part of men officially related to the Missouri Pacific Company and presumably solicitous for its welfare. But we are unable to say from the record that the wrecking of the construction company, or the defrauding of its stockholders, was in any proper sense an incident to their powers or duties as representatives of the first named company, or so related to their employment as to be within the scope of their power according to the most liberal interpretation of the term. Had Sage, Dillon, and Cross, the three directors who are found to have been interested in the Missouri Pacific Company, at or prior to the meeting of July 28, entered into a conspiracy to defraud the construction company by embezzling and converting to their own use the \$1,500,000 of bonds then owned and held by it, and had actually consummated their fraudulent purpose, we cannot conceive how the legal aspect of the case would have been essentially different. Yet no one will contend that the act of the conspirators would in that case be within the scope of their power as officers of the railroad company so as to render it liable for the result of their fraud. Equity is always solicitous of the rights of innocent stockholders of corporations, and although Jay Gould and his associates named in this record appear to own or control a majority of the stock of the Missouri Pacific Company, it is a matter of common notoriety, of which we must take notice, that there are many honest investors in that class of securities, and that some of the stock of that company is presumably held by persons innocent of any participation in the fraud charged. Now, if it is to answer in this action for the wrong alleged, the loss must be borne not alone by the participants in the fraud, but as well by the innocent and helpless stockholders. The foregoing fact is suggested, not because it is sufficient of itself to ex-

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cuse a corporation for such wrongful acts of its officers as are clearly within the scope of their powers, but as a reason for caution by the courts in application of the recognized rule. Before leaving this subject it should be observed also that this action is, in its practical effect, one for an accounting by the construction company against the railroad company. It follows, as was said in the former opinion, that the proceeds of whatever judgment is rendered in favor of the plaintiff must, after satisfying the debts of the first named company, be distributed ratably among its stockholders; but, according to the record, eighty per cent of the stock of that company is held by Gould and the recreant officers above named, while the debts thereof appear to be trifling, not exceeding \$60,000 in amount. It is evident, therefore, and such is the effect of our previous decision, that the allowance of this claim is to assess the sum of \$500,000, not against Gould and his associates, but against the stockholders of the Missouri Pacific Company, and of which amount \$400,000 and interest, less the ratable share of the debts of the construction company, must be turned over, not to Fitzgerald or Mallory, but to the very parties who are responsible for the confusion and disaster which overtook their venture.

But there is still another light in which the transactions in question may be viewed, and that is one suggested by the dissenting opinion heretofore filed, viz., that Messrs. Sage, Dillon, and Cross, the latter being at all times controlled by Gould, instead of acting in the interest of the Missouri Pacific Company were in fact using their positions of trust toward that company to profit personally at its expense and at the expense of its stockholders. It is sufficient, without further reference to the record, that the above conclusion is irresistible from the admitted facts, and is given especial emphasis as a ground of defense in the brief of counsel for the railroad company. Allusion is made to that fact in this connection merely for the pur-

pose of illustrating the attitude of the officers named toward the Missouri Pacific Company, the extent to which, if at all, the construction company or Fitzgerald and Mallory are affected by such corrupt purpose being reserved for consideration in connection with another branch of the case. It is further suggested as a ground for this claim, that in consequence of the failure of the Missouri Pacific Company to deliver its bonds at the several times specified in the contract, the construction company was delayed in the completion of its work and was thereby subjected to great loss, both of promised subsidies and prospective profits; but that fact, although charged as a part of the general scheme to defraud, is not made the basis of a distinct claim of relief. And, conceding all that is claimed for the evidence bearing upon that point, we are still unable to perceive the force of the plaintiff's reasoning, inasmuch as there is no apparent relation between the alleged breach of contract by the railroad company and the subsequent disposition of the bonds by the construction company. The rule which should control in this and like cases is aptly stated in *Warwick v. Hutchinson*, 45 N. J. Law, 61, viz.: "The wrongful act must be the act of the defendant, and the wrong done and the injury sustained must be as to each other the relation of cause and effect, and the damages, whether they arise from withholding a legal right or the breach of a legal duty, must be the natural and proximate consequence of the act complained of." (See, also, *Sycamore Marsh Harvester Mfg. Co. v. Sturm*, 13 Neb., 210; *Bridges v. Lanham*, 14 Neb., 369.) It follows that the claim based upon the discount of the bonds sold was rightly rejected by the district court and its action in that regard must be affirmed. This conclusion renders unnecessary an examination of the question of the alleged acquiescence to which prominence is given in the several briefs as well as the oral argument.

We will now briefly notice the claim in behalf of the

construction company on account of the sum of \$62,500 paid to Jay Gould as interest, and to which reference is made in the forty-second finding of the district court. We said, referring to this claim, in the former opinion: "That for this amount, with interest, the Missouri Pacific Railway Company is liable to the construction company, as a necessary corollary, follows from the propositions heretofore discussed." The contention of plaintiff's counsel was that the pretended loan of the \$2,500,000 of bonds by Gould was but a part of the conspiracy against the construction company and that the Missouri Pacific should be required to account for interest paid thereon on the ground that the directors, as in the transaction resulting in the disposition of the bonds, were acting within the scope of their authority. It was in that view of the case that the claim was allowed, and it follows naturally from what is here said with regard to the liability of the Missouri Pacific Company that our former decision will not stand the test of authority and that the claim in question must accordingly be rejected. But we find in the record another sufficient reason for the same conclusion. The loan was one of bonds payable in kind, and the claim in question is the precise amount of the semi-annual interest thereon as represented by the September, 1887, coupons paid by the Missouri Pacific Company at maturity, probably to Morton, Bliss & Co., the construction company's bankers, although the record is not clear on that point. But in the statement rendered by said firm for the month of September we find the following entry on the debit side of the account: "23d Sept., coups. \$2,500,000 M. P. 5 per cent bds. borrowed of Jay Gould, \$62,500." There is other evidence confirmatory to the above and which leaves no room to doubt the payment of the amount of this claim by the railroad company at maturity. It is a fact worthy of note, too, in this connection that the construction company does not claim to have returned said bonds and coupons, but that on the contrary there is still

due thereon an admitted balance of \$82,000. Our conclusion, after a careful scrutiny of the evidence explanatory of the transaction under consideration, may be thus briefly summarized: (1.) The transaction was a personal one between Gould and the construction company, for which the Missouri Pacific Company is not responsible. (2.) The construction company ratified said transaction by receiving and appropriating the bonds borrowed and voluntarily paying the interest accruing thereon with the knowledge and approval of its directors, including the plaintiff as well as Mr. Mallory, its president.

Our examination includes a further inquiry, and which involves the claim in behalf of the construction company for \$150,000 on account of the enforced reduction of the contract rate from \$11,000 to \$10,000 per mile for the first 150 miles of road constructed. The allegations of the plaintiff's bill, so far as they relate to this subject, are fully set forth in the opinion of Commissioner RYAN above mentioned and need not be repeated in this opinion. But preliminary to a consideration of the merits of that claim we are met by the contention that the transactions out of which it originated are in contravention of settled rules of public policy, and therefore void *ab initio*. Inasmuch as our investigation has led to a conclusion at variance with that stated in the opinion approved, as well as the able dissenting opinion of Commissioners RAGAN and IRVINE on the former hearing, it is deemed proper to mention here some of the facts which tend strongly to characterize the transaction, so far as the construction company is concerned, and which are especially significant as bearing upon the question of the good faith of the minority stockholders, Fitzgerald and Mallory. Our views with respect to the transaction, so far as it concerns the directors and others officially related to the Missouri Pacific Company, sufficiently appear from what has been said, and do not require further notice. The district court, it should be re-

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marked, determined that question in favor of the legality of the contract by the twenty-fourth finding, as follows:

“(24.) The court finds that each and all of the above named contracts for the construction of the several roads named were in nowise unconscionable contracts, but were fair and reasonable contracts, in which the interests of all the parties to the several contracts were properly protected, and at the time of the execution of the said contracts the officers of the Fitzgerald & Mallory Construction Company, who executed said contracts on behalf of the construction company, acted in good faith in the interests of the construction company, and the officers of the Missouri Pacific Railway Company, who executed said contracts on behalf of said railway company, acted in good faith in the interest of the said railway company.”

The above finding, so far as it asserts the good faith of the Missouri Pacific Company, cannot be sustained, since, as we have seen, it is, even according to the contention of that company, clearly against the evidence. It is charged in paragraph three of the plaintiff's bill, and fully established by the proof, that at the date of the contract with the Denver, Memphis & Atlantic Railroad Company, to-wit, April 6, 1886, and the subsequent contract with the Missouri Pacific Company, on May 4 following, the directors of the construction company were John Fitzgerald, the plaintiff herein, S. H. Mallory, S. S. King, T. M. Stuart, and Edward A. Temple, but that after the officers of the Missouri Pacific acquired a majority of the stock of the last named corporation they demanded the resignation of all of said directors except Fitzgerald and Mallory, and that on the 3d day of November, 1886, the board of directors were chosen to which reference is made in the twenty-eighth finding above set out. We have searched the record in vain for evidence tending to prove that the construction company, as organized at the date of said contracts, contemplated any other than legitimate transactions. It is

true the agreed rate for the construction of the Denver, Memphis & Atlantic line may appear exorbitant in the light of subsequent contracts, but the explanation thereof seems altogether reasonable, viz., that the securities of that company would have little marketable value compared with the bonds of the Missouri Pacific, in which Mr. Gould was personally interested, and in which he was investing his private fortune. But the record does contain evidence of good faith on the part of the construction company. On the 30th day of October, 1886, Mr. Mallory, as president, made and published the following statement:

“*To the Stockholders of the F. M. C. Co.:* Mr. Gould advises me that he offers 120 for F. M. C. Co. stock and Mo. P. take road and pay all liabilities of Const. Co. The following statement is made for our information: We have now 115 miles of track down, the grading and bridging mostly done on ninety-eight miles more and expect to get track on by July 1. The following is the estimated cost of 203 miles at \$11,128 per mile, \$2,268,638.84, for which we should receive per contract, 203 miles, \$12,000, Mo. Pac. bonds.....\$2,436,000 00
 Subsidies..... 456,000 00

\$2,892,000 00

\$623,861 16

Making a dividend of forty-one per cent on \$1,500,000 stock. When construction company was formed and contract made with Mo. Pac. it was not expected that over thirty per cent would have to be called in. Now it is the western stockholders who have made it possible for you to realize forty per cent in less than an average of six months time. We gave you an equal interest with us without any bonus, expecting that you would provide the necessary funds to carry on the work. Your means are at command—ours in land, merchandise, banks, etc., not easy to realize on. We built 200 miles of railroad in six months, therefore we

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think that if it is thought best to terminate contract or sell out stock, that the Missouri Pacific pay forty per cent. which is no more than the contract price—at same time get a cheap road, worth more than it costs, and also to give to Mallory & Fitzgerald the town sites on line now under construction which have been secured by Town Site Company. * * * We went into the project in good faith, and have so acted. Statements and reports have not been made, probably, as should have been done. What we thought of was to get road, other things would take care of themselves, which I see has caused a feeling of distrust in your mind, and we are ready for any equitable adjustment. Under our contract there is 200 miles more of road not yet started on which the profits will equal those already earned.”

In a subsequent statement, the date not appearing, Mr. Mallory says:

“The F. M. Construction Co. was organized with \$1,000,000 capital. For reasons well known to all, capital was increased to \$1,500,000, which was considered ample to build road and complete contracts. The control of the company was taken by New York people. It was expected that the company finances would be looked after for all alike. * * It is a well known fact that the western stockholders are not able to furnish means to build their portion of the 591 miles of road. The balance are. Our bonds were not sold when they could have been at par, and owing to circumstances over which we have no control we are compelled to take a discount of ten per cent. At the west end I have endeavored to give the eastern stockholders all the benefits arising from the construction of the road, and now I claim the company should take such steps as are necessary to procure funds to complete contracts.”

The foregoing quotations are reinforced by other evidence, but are sufficient for our purpose, and satisfy us that prior to the ascendancy of the Gould interest in the man-

agement of the construction company, its only purpose was to make a legitimate, although liberal, profit out of said contracts, and that Fitzgerald and Mallory have been victims and not perpetrators of any wrongs subsequently committed in its name or through its agency.

There is also a question of pleading presented in this case. 'The legality of the several contracts is not assailed by answer or otherwise in the answer. The rule is correctly stated in the dissenting opinion as follows: "When upon the trial it is apparent from the evidence material to the issues that the cause of action rests upon an agreement against public policy the court will of its own motion refuse to enforce such agreement when the parties are *in pari delicto*." It may be added, however, as the essence of the authorities, that where the illegality of an agreement is not suggested by the plaintiff's pleadings or proofs it must, in order to be available to the adverse party, be especially pleaded. (*Wilde v. Wilde*, 37 Neb., 891.) If the parties hereto are *in pari delicto* within the rule stated, it is by reason not of the original scheme for the building of the Denver, Memphis & Atlantic road on the contracts mentioned, but on account of the subsequent manipulation thereof in fraud of the rights of the stockholders of the Missouri Pacific Company or others; and if the transactions alleged as the basis of this action are void for illegality, it is by reason of some fact or facts not disclosed by the plaintiff's bill or proofs, and should therefore have been pleaded by the respondent company.

Coming now to the merits of the claim, let us first ascertain the terms of the contract under which the 150 miles of road in question was constructed. The only specifications descriptive of the character of the work are contained in the following quotation from the contract of May 4: "The railroad to be constructed for the Denver company shall be of standard gauge, of not less than 56-pound steel rails, 2,600 ties to the mile, with stations not more

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than eight miles apart, and water stations not more than twenty miles apart, and shall be equal in its general character to the roads now being constructed by the Missouri Pacific Railway Company in the state of Kansas, all subject to the approval of the chief engineer of the Pacific Company." By another provision payment was to be made for each ten miles of road as constructed, the contract price as finally agreed upon being \$11,000 per mile, in the five per cent trust bonds of the Missouri Pacific Company. On May 25 Mr. Mallory addressed the vice president of the Missouri Pacific, Mr. Hopkins, advising him that ten miles of road would be completed the next week, and adds, "I suppose you are attending to the bonds." On June 7 he addressed Mr. Hopkins as follows: "We will want another 10 P. C. June 20 and another July 10 unless you can make disposition of bonds or make a loan for the company. If bonds are not ready I suggest a loan." On June 15 Mr. Hopkins addressed Mr. Mallory as follows: "Yours of May 25 and June 7 received. I find it will take some time before we can get the trust company to cancel bonds and mortgage. * * * Our attorneys inform us that this company cannot issue its bonds without calling a meeting of the stockholders to obtain their permission. This will make some delay and prevent any sale of bonds for the present, so you will have to obtain what money you want by calls on the stockholders." On October 10 Mr. Mallory wrote Mr. Hopkins as follows: "Under our contract the road should have been paid for in ten-mile sections. If this had been done the calls made would not have been necessary. * * * Funds are now needed to pay estimates and pay rolls. If not furnished the work will be delayed and subsidies jeopardized." It was this failure to pay for the road as constructed that occasioned the two statements of Mr. Mallory heretofore set out and which was continued until February 7, 1887, on which day a meeting of the directors was held in the city of New York, with the following result:

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"195 BROADWAY, NEW YORK CITY,

"February 7, 1887.

"An adjourned meeting of the directors of the Construction Company was held this day, at which were present S. H. Mallory (who was chairman of said meeting), George J. Gould, R. I. Cross, and Russell Sage; also Mr. Jay Gould.

"The minutes of the previous meeting were read, and on motion of Mr. Sage were approved.

"Mr. Jay Gould, on behalf of the Pacific Company, stated that certain portions of the Denver railway were unsatisfactorily constructed, and for that reason the Missouri Pacific would decline to pay more than \$10,000 per mile for the 150 miles of railroad built; that the Pacific Company was ready to take the road at that price.

"On motion of Mr. Cross, it was voted that the proposition of the Pacific Company to receive the 150 miles at \$10,000 per mile be accepted."

The foregoing record and correspondence is set out, not because it sheds any direct light upon the subject of the completion of the road, but as preliminary to the principal question and as illustrating the relations of the parties to each other at the time of the alleged reduction. The findings of the district court on that issue are as follows.

"(14.) On the 15th day of June, 1886, the said construction company had ten miles of said road completed and ready for delivery to the Missouri Pacific Railway Company. That on the 15th day of July, 1886, the construction company had thirty miles of said road completed and ready for such delivery. That on the 14th day of February, 1887, the construction company had one hundred and fifty miles of said railroad completed and ready for delivery, with the exception of some finishing work upon the road-bed, bridges, and cattle guards. That on August 1, 1887, said road was entirely completed.

"(15.) That said railroad was turned over and delivered

to the defendant the Missouri Pacific Railway Company by the defendant the Fitzgerald & Mallory Construction Company, as follows: One hundred and fifty miles on the 14th day of February, 1887; twenty-nine and eighty-three hundredths miles on the 11th day of August, 1887; ninety-three and fifty-seven hundredths miles on the 11th day of August, 1887; one hundred and twenty-four and forty-two hundredths miles on the 1st day of October, 1887; twelve and eighty-two hundredths miles on the 15th day of December, 1887."

It is, as we have seen, contended by the Missouri Pacific Company that the action of the board of directors of the construction company on February 7, 1887, was simply the settlement and satisfaction of a disputed claim, and should, therefore, be upheld by the applications of familiar principles; but to that proposition we cannot assent. In the first place it is not shown that there was a *bona fide* dispute between the parties, while on the other hand the evidence tends strongly to prove that the claim with respect to character and condition of the work was a mere pretense on the part of the Missouri Pacific Company, or of Mr. Gould in its name. The latter had inspected a portion of the first 150 miles of road in the month of September previous, and his objection to the work is indicated by one answer, viz.: "I told Mr. Mallory the work was very defective, badly located and badly constructed, and I told him I would feel ashamed to ask the Missouri Pacific to accept it." George Gould, who accompanied the last named witness at the time mentioned, testified: "Well, I distinctly recollect that Mr. Jay Gould was thoroughly disgusted with the way the road had been built, and he told Mr. Mallory so. Becoming tired and disgusted, he came back before he had gone quite over the road. I remember he stated that it was in such bad condition that he would not go further over it, and told Mr. Mallory he would have the Missouri Pacific engineer go over the balance and make a report to him. * * *

He was particularly disgusted with the alignment of the road. There was an unnecessary amount of curvature." Mr. S. H. H. Clark, who was also one of the party, testified in his examination in chief that with the exception of the alignment and broken grades and the ties, he considered it a fair road. He also testified that Mallory's attention was directed to the fact that some of the ties were inferior in size and quality, and that the latter agreed to put in 176 extra ties per mile. We have not searched the record in order to determine whether the defendant company was a party to the location of the line, since the strong presumption is that the route, if not actually located, was at least approved by the engineering department of the road, hence objections on account of the alignment after the road was completed and ready for delivery should not be regarded with favor. It is unnecessary to refer to the plaintiff's evidence as to the condition of the line in September, 1886, or even in February, 1887, since it is as well established as a disputed proposition can be, that it was finally completed according to the terms of the contract, under the direction and at the cost of the construction company. It is a fact worthy of comment that Mr. McLaughlin, chief engineer of the Missouri Pacific, was not produced as a witness, although Mr. Thayer, the engineer under whose direction the work was carried on, had testified in behalf of the plaintiff that he had gone over the line with him, McLaughlin, about February 13, 1887, when the road was finally inspected and approved by the latter, and the only objection made thereto was to suggest an improvement in one bridge, which was subsequently made. In the record of the meeting of February 7 no mention is made of the chief engineer or suggestion that he had refused to accept the road on account of the defective construction, or that the work was not equal in character to other lines constructed by the defendant company in Kansas.

During the argument, in response to a question by the writer relative to the expense incurred by the Missouri Pacific Company in completing this particular 150 miles of road, it was answered, without being challenged, that the road was fully completed by the construction company. And it is conceded that subsequent to the meeting of March 7 the last named company, at its own expense, employed from 250 to 350 men on that part of the line for a period of from one to three months in taking out false work, putting in truss bridges, widening banks and excavating, etc. Briefly stated, the construction company, on the demand of the Missouri Pacific, first accepted a reduction of \$1,000 per mile to compensate for an alleged breach of contract, and proceeded immediately at its own expense to complete the road according to the letter of the agreement, so that the railroad company, in addition to the road for which it contracted, was enriched to the amount of \$150,000 out of the treasury of the construction company. We must confess to overlooking the unconscionableness of the transaction in our admiration for the genius which could conceive and successfully execute such a plan. The rule has been long recognized, and may be regarded elementary, that a debt cannot be extinguished by the payment of a part thereof unless made and accepted upon a new and sufficient consideration. (*Fitch v. Sutton*, 5 East [Eng.], 230; *Heathcote v. Crookshanks*, 2 T. R. [Eng.], 24; *Harrison v. Close*, 2 Johns. [N. Y.], 448; *Keele v. Salisbury*, 33 N. Y., 648; *Hastings v. Lovejoy*, 140 Mass., 261; Bishop Contracts, 412.)

Another intrinsic vice of the transaction is that a majority of the directors of the construction company were, by reason of adverse interest, disqualified to act therein. The action of February 7, 1887, differs from that resulting in the disposition of the bonds, since the Missouri Pacific Company was one of the contracting parties, and represented at said meeting by Mr. Gould, whose dominion over both corporations, it appears, was absolute. The directors

of the construction company present thereat were Messrs. Mallory, who acted as president, Cross, George Gould, and Sage, the two latter being also directors of the Missouri Pacific Company. One who is agent for two parties cannot, in the absence of express authority from each, represent both in a transaction in which their interests conflict. (Morawetz, Corporations, 528; Mechem, Agency, 455.) And never was the infallible truth that a man cannot serve two masters better illustrated than by the facts of this case. Each party to the agreement was interested in securing the most advantageous terms consistent with fair dealing and the rights of the other, hence Messrs. Gould and Sage could not at the same time protect the rights of both corporations. Conceding the personal integrity of the directors named, as well as of Mr. Cross, who acted with them, still the law has placed the seal of its disapproval upon the transaction and pronounced it fraudulent, not on account of any imputed evil purpose on their part, but from motives of public policy. It was said in *Gorder v. Platts-mouth Canning Co.*, 36 Neb., 548: "The relation of directors to the stockholders of a corporation is not essentially different from that ordinarily existing between trustees and *cestui que trust*. Courts of equity will set aside such contracts for fraud, and generally on a slight showing of fraud on the part of the trustee." And the proposition that this transaction is fraudulent as against the construction company, without regard to the motives of the directors named, is sustained by the following among the many cases which might be cited to the same effect: *United States Rolling Stock Co. v. Atlantic & G. W. R. Co.*, 34 O. S., 450; *Kitchen v. St. Louis, K. C. & N. R. Co.*, 69 Mo., 204; *Flagg v. Manhattan R. Co.*, 4 Am. & Eng. R. R. Cases [N. Y.], 141; Beach, Private Corporations, 247.

The alleged settlement is voidable for another reason viz., it was procured under circumstances amounting to practical compulsion, which is nearly related to duress, and

may be made the ground of relief either at law or equity. A payment or concession exacted will be held compulsory when made or allowed through necessity in order to obtain possession of property illegally withheld, where the detention is fraught with great immediate hardship or irreparable injury. (Pollock, Contracts, 555*; *Astley v. Reynolds*, 2 Strange [Eng.], 915; *Shaw v. Woodcock*, 7 B. & C. [Eng.], 73; *Cobb v. Charter*, 32 Conn., 358; *Harmony v. Bingham*, 12 N. Y., 99; *Stenton v. Jerome*, 54 N. Y., 480; *Peyser v. Mayor*, 70 N. Y., 495; *Spaids v. Barrett*, 57 Ill., 289; *Chandler v. Sanger*, 114 Mass., 365; *Lonergan v. Buford*, 148 U. S., 581.) The contract, as we have seen, provides for payment on the completion of each ten miles of road. Thirty miles thereof was completed as early as July 15, 1886, and according to the statement of Mr. Mallory, under date of October 30, 1886, there was then completed 115 miles of road and, in addition thereto, 98 miles which would be finished not later than January 1 following. The only response to the repeated calls upon the Missouri Pacific for money was assessments of the stock of the construction company until increasing demands had exhausted not only the resources of the company but the private funds as well of Messrs Fitzgerald and Mallory. So that at the date of the meeting in February both the individuals named and the company were confronted by bankruptcy and financial ruin. It was under these circumstances that the construction company chose to accept payment at the rate of \$10,000 per mile instead of the contract price, rather than the alternative of an entire abandonment of the enterprise in which it was engaged, and that such action was compulsory within the rule established by the authorities cannot on the record be doubted.

It is the province and delight of equity to brush away mere forms of law, whenever designed as an ambushade from whence to assail either public or private rights. Such, in substance, is one of the maxims of the law, and never

was it more fittingly applied than to the facts of this case. But it is strenuously insisted that both the complaining stockholders and the construction company are, by reason of their acquiescence in the alleged compromise, now estopped to deny its legality. Let us briefly examine that question in the light of the record. Mr. Mallory, referring to the subject, testified: "I objected to the throwing off of the \$1,000 per mile at all times, but the majority of the board accepted it and I had to acquiesce." Mr. Black, secretary of the Denver Company, who was present at the meeting of February 7, was asked if Mallory consented to the proposition of Mr. Gould, and in reply said: "I don't think he did, not at the meeting at least, because at the meeting he opposed it and made quite a lengthy statement in opposition. He said the company had earned the full contract price and was entitled to it." Mr. Fitzgerald, who was not present at that meeting, testified that on learning of the action taken by the board he objected, and soon thereafter talked the matter over with Messrs. Sage and Dillon, who would not consent to a correction. He protested at different times to other members of the board and threatened suit for the recovery of the balance claimed, but offered no resolution to rescind the action complained of. Acquiescence in a fraudulent transaction is in effect a new agreement made consciously with an intent to condone the wrong done, and will not be inferred from doubtful evidence, but should be established like any other material fact, by the party asserting it. We are referred to no positive act indicating acquiescence in this instance, the only claim being that it should be inferred from the time intervening between the date of the action complained of and the institution of the suit, to-wit, one year, ten months, and seventeen days. Time alone, unaffected by other circumstances, will not bar the right to rescind a voidable transaction, since it is not for a wrong-doer to impose extreme vigilance and promptitude as conditions to the exercise of the rights of the injured party. (Pollock,

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Contracts, 548*; *Pence v. Langdon*, 99 U. S., 581; *Montgomery v. Pickering*, 116 Mass., 227; *Tarkington v. Purvis*, 128 Ind., 187; *Maxon v. Payne*, L. R., 8 Ch. App. [Eng.], 881; *Foley v. Holtry*, 41 Neb., 563.)

There is still another contention of the defendant company which calls for notice in this connection, viz., that there is a defect of parties hereto. It is said that the action in this class of cases is primarily against the defaulting directors or officers and that the proceeding against the corporation is but an incident thereto, from which it is argued that George Gould, Sage, Dillon, and Cross are necessary parties to a determination of this controversy. The case of *Slattery v. St. Louis & New Orleans Transportation Co.*, 91 Mo., 217, to which we have been referred, appears to sustain the proposition contended for. But unfortunately for the defendant that objection was not made by answer or demurrer and is not now available, inasmuch as the case actually made involves only the rights of parties before the court. (Civil Code, sec. 46; Boone, Code Pleading, sec. 51; Maxwell, Code Pleading, p. 66; *Reformed Presbyterian Church v. Nelson*, 35 O. S., 638.)

It is deemed unnecessary to restate the entire account between the defendant and the construction company. We are, after a careful comparison, however, constrained to adopt the method of computation employed in the dissenting opinion as the more satisfactory, and which has the apparent approval of the defendant company. To the finding therein in favor of the construction company we add the further sum of \$150,000, being the balance due at the contract rate for the first 150 miles of road, with interest. The account may accordingly be summarized thus:

Balance as per previous finding.....	\$63,816 95
Interest to January 1, 1895.....	4,839 38
Additional allowance.....	150,000 00
Interest at seven per cent to January 1, 1895,	82,250 00
	<hr/>
	\$300,906 33

In the plaintiff's amended bill he prays for a receiver to wind up the business of the construction company and to distribute its property among the stockholders thereof, after paying and satisfying all of its just debts, and a supplemental application has been addressed to us for the appointment of a receiver here instead of remanding the cause for final action by the district court. We should, in view of our settled practice, feel constrained to dismiss the application summarily, but realizing that we are not without blame for the long delay in this court, to the prejudice of all parties concerned, we have decided to retain the cause for such further action as may hereafter be deemed appropriate. The usual and orderly course of procedure would be through the agency of a receiver. The application is, however, resisted in this instance for reasons which will be here noticed.

The first objection which we notice is that this court is without jurisdiction of the action, and which is seriously urged, notwithstanding the hearing of the cause on its merits in the district court and in this court. From the record submitted in connection with the supplemental proceeding it appears that the cause was at one time removed into the circuit court of the United States for the district of Nebraska on the petition of the Missouri Pacific Company; that there was thereafter a plea to the jurisdiction of that court and a motion to remand, both of which were overruled by the district judge, but that subsequently an order remanding the cause was made by the circuit judge. The last named order is, it is contended, in excess of authority and void, hence the circuit court still has jurisdiction of the action. We will not examine the grounds for that claim. It is a sufficient answer that in all cases of apparent conflict between the state and federal courts the latter are the exclusive judges of their jurisdiction over the subject of the action. (*Freeman v. Howe*, 24 How. [U. S.], 459.) We must, therefore, decline to review the finding by the cir-

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cuit court against its jurisdiction of this cause or the order remanding it to the district court of Lancaster county.

The second objection is based upon the following facts: On the 24th day of December, 1888, John Fitzgerald personally sued the Fitzgerald & Mallory Construction Company in the district court of Lancaster county on account for money and material furnished and services rendered. Said cause was removed to the circuit court for the district of Nebraska, where a trial was had, resulting in a judgment for the plaintiff therein in the sum of \$51,412.62, which was subsequently affirmed by the supreme court of the United States, and is still unsatisfied; that an order of attachment was issued from the district court of Lancaster county, and served by summoning the Missouri Pacific Company, as garnishee of the construction company, and that in the final judgment the said garnishee was ordered and adjudged to hold, subject to the further orders of the circuit court, all money owing by it to the said defendant; wherefore it is said that whatever sum is now due from the defendant to the construction company is in the custody of that court and beyond the control of a receiver named by us. A critical examination of that proposition is rendered unnecessary, since counsel have overlooked the fact that the attachment proceeding was evidently abandoned in the circuit court, where the record shows an ordinary judgment for damage unaccompanied by an order against the Missouri Pacific Company as garnishee. This case is therefore plainly distinguishable from *Reed v. Fletcher*, 24 Neb., 435, and *Northfield Knife Co. v. Shapleigh*, 24 Neb., 635, cited by defendant.

Lastly, it is objected on the ground that a receiver for the construction company was named by the circuit court for the district of Nebraska on the 12th day of January, 1895, in a suit brought against it by the Kansas, Colorado & Pacific Railroad Company, a Kansas corporation. It is a rule, recognized alike by state and federal tribunals, that

the court which first acquires jurisdiction of the subject of an action will retain such jurisdiction until the final determination of the controversy. Indeed, as remarked by Mr. Justice Swayne in *Taylor v. Taintor*, 16 Wall., 370, "It is indeed a principle of universal jurisprudence that where jurisdiction has attached to person or thing, it is, unless there is some provison to the contrary, exclusive in effect until it has wrought its function." (See, also, *Home Ins. Co. v. Howell*, 9 C. E. Greene [N. J.], 238; *Ackerly v. Vilas*, 15 Wis., 401; *Taylor v. Corryl*, 20 How. [U. S.], 583; *Freeman v. Howe*, 24 How. [U. S.], 450; *Ober v. Gallagher*, 93 U. S., 199.) No sufficient reason having been suggested for denying the application, a receiver will be appointed with authority to collect the amount here adjudged against the defendant company, and to disburse the same under the directions of the court. Decree for plaintiff in the sum of \$300,906.33, to draw interest from the first day of this term.

DECREE ACCORDINGLY.

RYAN, C., adheres to the views heretofore expressed by him.

STATE OF NEBRASKA, EX REL. PETER McMULLEN,
APPELLEE, V. AMBROSE AFFHOLDER ET AL., APPEL-
LANTS.

FILED APRIL 4, 1895. No. 7180.

Mandamus: REVIEW. A *mandamus* proceeding under our Code of Civil Procedure is an action at law and can be reviewed only on error and cannot be appealed. *State v. Lancaster County*, 13 Neb., 223, followed.

APPEAL from the district court of Burt county. Heard below before AMBROSE, J.

H. H. Bowes, for appellants.

Charles T. Dickinson, contra.

HARRISON, J.

The appellee as relator filed a petition in the district court of Burt county December 9, 1893, in an action then commenced by him against the appellants as officers of school district No. 58, Burt county, the object of which was to obtain the issuance of a writ of *mandamus*, ordering the appellants to comply with the provisions of an act of the legislature entitled "An act to provide cheaper text-books, and the district ownership of the same," (Comp. Stats., 1893, pp. 771a, 771b,) and furnish to his children, and other pupils of the school in the district, text-books for their use. An alternative writ was allowed and served upon appellants, to which they made a return or answer, and as a result of the submission to and consideration of the case by the district court a judgment was rendered against the respondents, by which a peremptory writ of *mandamus* was allowed to issue against them, from which judgment they appealed to this court.

An action of *mandamus* is an action at law and governed, in regard to trial and review, by the rules of practice applicable to such actions and can only be reviewed in this court in an error proceeding, and not by appeal. In the case of *State v. Lancaster County*, 13 Neb., 223, a case in which a *mandamus* proceeding was appealed to the supreme court, it was held: "A *mandamus* under our practice is an action at law, and is reviewable only on error and not by appeal;" and in the opinion it was said: "Appeals are authorized by statute in actions in equity, but a proceeding by *mandamus* is strictly a legal action. In *Commonwealth v. Dennison*, 24 How. [U. S.], 97, Taney, C. J., says: 'A *mandamus* in modern practice is nothing more than an action at law between the parties, and is not now regarded as a

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prerogative writ.' An action at law can be reviewed only on error." (*State v. Lancaster County*, 13 Neb., 223; *State v. Chicago, St. P., M. & O. R. Co.*, 19 Neb., 482; *State v. School District*, 30 Neb., 527; Maxwell, Pleading & Practice, 729.) The appeal in the case at bar must be dismissed.

APPEAL DISMISSED.

MARY SHEEDY, APPELLANT, v. JAMES H. MCMURTRY,
APPELLEE.

44	499
50	877
53	602
44	499
460	700

FILED APRIL 4, 1895. No. 7160.

1. **Right of Plaintiff to Dismiss Action: CONDITIONS.** The right of a plaintiff to dismiss an action at any time he so desires is not an absolute unqualified right, but conditions precedent, such as payment of costs, may be imposed by the court in its discretion.
2. **Appeal: DISMISSAL: PRACTICE: ATTORNEY'S LIEN: SETTLEMENT.** An action for specific performance of a contract for sale of real estate, was compromised after trial had in the district court and appeal taken to this court, a third party purchasing the interest of plaintiff in such action. The defendant in the action, for a valuable consideration, became entitled to be released and discharged from all obligations existing upon him by virtue of such contract and a dismissal of the action. After these occurrences and motion filed by defendant to dismiss the suit and a dismissal filed by the party who succeeded to the interest of plaintiff, the attorney for plaintiff filed a lien for fees and expenses in conducting the suit, also a petition asking to be allowed to intervene and prosecute the appeal unless such fees and expenses were paid. *Held*, That inasmuch as the plaintiff's rights against defendant had been extinguished by settlement made before the lien was filed, or any notice of it given to defendant, there was nothing to which it could attach remaining in the hands of defendant, and the defendant was entitled to have the cause dismissed. *Held further*, That the right to payment of such fees and expenses by the plaintiff, or the party who succeeded to her rights, could not be properly litigated in this action at this time.

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APPEAL from the district court of Lancaster county.
Heard below before TIBBETS, J.

Charles O. Whedon and Charles E. Magoon, for appellant.

J. R. Webster, contra.

HARRISON, J.

On the 27th day of May, 1893, Mary Sheedy and James H. McMurtry entered into a contract by which she agreed to sell and he to purchase certain real estate situate in the city of Lincoln, and at a subsequent date during the same year an action was commenced by Mary Sheedy in the district court of Lancaster county, the relief sought being a specific performance of the contract. Issues were joined and trial of them had in the district court and an appeal from the decree therein rendered taken to this court by the plaintiff. As the result of the negotiations between the parties and others during its pendency here, the property involved was conveyed by Mrs. Sheedy to Kent K. Hayden, the consideration being \$1,750, and the following instrument executed by her and delivered to him:

"Know all men by these presents, that I, Mary Brust, formerly Mary Sheedy, in consideration of fifteen hundred dollars to me in hand paid and receipt whereof is hereby acknowledged, do hereby set over and assign to Kent K. Hayden, of Lincoln, Nebraska, all interest, claim, demand, or right of action I have or may claim against James H. McMurtry, of Lincoln, Nebraska, in, under, or in any way arising out of the contract for sale of my interests in the real estate and property of the estate of John Sheedy, deceased, bearing date May 27, 1893, and I hereby authorize my said assignee to prosecute, collect, compromise, satisfy, release, and discharge all suits or claims founded on or growing out of said contract in his own name or in my

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name as to him shall seem fit, but at his own cost and expense, and to his own proper use, and I hereby name, constitute, and appoint him, Kent K. Hayden, my true and lawful attorney in fact by these presents, irrevocable, in my name, place, and stead to do all things necessary or proper to be done in the premises as fully and effectually as I might do if myself personally present, hereby ratifying and confirming all my said attorney shall do in the premises."

It further appears that of the \$1,750, the consideration agreed to be paid for Mrs. Sheedy by Kent K. Hayden, McMurtry paid \$750 and Hayden \$1,000, the agreement between these two parties being that in consideration of the payment of the \$750 by McMurtry, Hayden would release and discharge McMurtry from any and all liability under the contract of purchase, the basis of the action for specific performance. Hayden, on October 2, 1894, executed and delivered to McMurtry a full release, satisfaction, and discharge of all obligations on his part arising out of such contract, and on the same date the attorney for McMurtry filed a motion in this case for the dismissal of the appeal, setting forth therein, as grounds therefor, the facts in reference to the transactions between Mrs. Sheedy, Hayden, and McMurtry, and which in the main, as to the substance and effect, we have hereinbefore stated, and on January 2, 1895, served a notice of this motion on attorneys for appellant, and on January 15, 1895, the following was filed in this court for Kent K. Hayden: "Comes now appellant Mary Sheedy, by Kent K. Hayden, her attorney in fact, and hereby dismisses the appeal taken by her herein from the judgment of the district court, at her own costs." On January 26, 1895, the attorney for appellant filed the following: "Notice is hereby given that I, Chas. O. Whedon, an attorney at law, and attorney for the appellant in this suit, claim and have a lien on the premises described in the petition, and belonging to the appellant at the time this suit was commenced, and on all the property in said

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petition described and on the contract set forth in the petition in this case for the sum of \$523.25, for my services as attorney for said appellant and for moneys expended and disbursed in the prosecution of this suit; \$400 of said sum being for services as attorney for plaintiff and appellant and \$123.25 for and on account of moneys paid out in the prosecution of this action;" and on January 28, 1895, filed a petition in which he asked to be allowed to intervene, and unless his fee and money expended by him, etc., were paid, that the dismissal of the action be not allowed and he be permitted to prosecute it to final decree for the purpose of obtaining payment of the fee and other moneys. After a hearing in this court the following order was made and entered: "This cause came on to be heard upon a motion by the appellee to dismiss the appeal herein, on consideration whereof it is ordered by the court that said motion to dismiss be sustained on condition that Kent K. Hayden within ten days pay to the clerk of this court all the taxable costs in this court and the court below, including printing of briefs."

The right of a plaintiff to dismiss his action at any time he so desires before it has been submitted to the court or a jury, as a matter of course, as a general proposition, is without doubt. In this state he may do so during vacation if no set-off or counter-claim is filed by the opposing party, but it is upon payment of the costs. (Sec. 430a, Comp. Stats., 1893, p. 911.) But we think that the existence of the right of a plaintiff to dismiss at any time during the pendency of a cause, as a general proposition, must be qualified, and is not absolute in the sense that it takes the subject without the control of the court in which the cause is pending, so that it cannot, within its discretion, impose the condition of the payment of costs as obligatory and precedent to a dismissal of the action. In the case of *Young v. Bush*, 36 How. Pr. [N. Y.], 240, after citing in support of the doctrine that the court may make the allowance of

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a dismissal depend upon the payment of costs, *McKenster v. Van Zandt*, 1 Wend. [N. Y.], 13, *Harden v. Hardick*, 2 Hill [N. Y.], 384, and *Huntington v. Forkson*, 7 Hill [N. Y.], 195, it is said: "The principle asserted in all these cases and numerous others is, that the right to discontinue is not absolute, that it is to be exercised under the control of the court, and that equitable terms may be imposed in proper cases, and that the right to discontinue may be disallowed in the discretion of the court, or restricted * * upon equitable considerations."

It appears from some affidavits filed in support of the motion to dismiss that neither McMurtry nor Hayden, at the time of the transaction of the business between them and Mrs. Sheedy, had knowledge that attorney for appellant had any claim or demand against Mrs. Sheedy for fees, money expended for her in prosecuting the suit, or costs paid, and it is not claimed or shown that there was any fraud or collusion practiced or attempted in the transaction between Mrs. Sheedy, Kent K. Hayden, and James H. McMurtry which resulted in a full settlement of the matters at issue in the case, and McMurtry's right to a dismissal of it. No lien had then been filed, nor was, as we have seen, filed until January 26, 1895, after the appeal of the case to this court, and the settlement and filing of the dismissal by Hayden, and the motion to dismiss for McMurtry. A lien in favor of the attorney upon property in the hands of the adverse party belonging to his client can only exist from the time of giving notice of the lien to that party, and as to the rights of James H. McMurtry, under the facts shown by the testimony accompanying this motion, we are satisfied he was warranted in perfecting any settlement that he could effect with Mrs. Sheedy, or the party who succeeded to her rights in the premises (*Elliot v. Atkins*, 26 Neb., 403; *Lavender v. Atkins*, 20 Neb., 206; *Rowe v. Fogle*, 10 S. W. Rep. [Ky.], 426; *Mosely v. Jamison*, 14 So. Rep. [Miss.], 529; *Weeks*, Attorneys at Law,

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sec. 382, and cases cited in note 3; 1 Am. & Eng. Ency. Law, 970 *et seq.*, and notes); and filing the attorney's lien after the settlement was completed could not confer any rights in favor of the attorney as against McMurtry other than existed at the time of its filing in favor of his client, and these had been fully and entirely extinguished by the adjustment of the difficulty, which had been previously completed, and any liability of Mary Sheedy in favor of the attorney for fees or expenses due him in the case, or against Hayden, if he assumed and agreed to pay such liability, cannot properly be litigated in this case at this time in this court. An order conforming to the views herein expressed and dismissing the action on the payment of all costs was made and entered March, 1895.

DISMISSED.

FRED SCHELLY V. C. SCHWANK.

FILED APRIL 4, 1895. No. 4672.

1. **Instructions: ASSIGNMENTS OF ERROR.** Where instructions are grouped in the respective paragraphs of a petition in error in which the giving or refusal to give them is assigned as error, such errors will be examined no further than to determine that of those given one was correct, or of the instructions refused the action as to one was not erroneous.
2. **Assignments of Error.** An assignment in a petition in error that "there was error of law occurring at the trial, duly excepted to" is not sufficient to obtain a review of the action of the court upon the admission of testimony.
3. **Review: SUFFICIENCY OF EVIDENCE.** Where there is sufficient evidence to sustain a verdict it will not be disturbed.

ERROR from the district court of Madison county.
Tried below before POWERS, J.

44	504
48	298

44	504
52	752

Schelly v. Schwank.

E. P. Weatherby and S. O. Campbell, for plaintiff in error.

Allen, Robinson & Reed, contra.

HARRISON, J.

This action was commenced in the district court of Madison county by defendant in error against George Davis, and in the petition it was alleged, in substance, that on the 13th day of May, 1886, the firm of Wiegand & Stratman was indebted to defendant in error in the sum of \$400, and executed and delivered to him for said amount a note and a mortgage of certain personal property to secure its payment, and on the next day defendant in error, or George Dopson, his agent, took possession of the mortgaged chattels and advertised them for sale, or was proceeding in the regular manner to foreclose the mortgage; that on the 3d day of July, of the same year, George Davis, the then sheriff of Madison county, by virtue of a writ of execution issued from the county court, levied on the property, took it into his possession, and converted the proceeds to his own use, thereby depriving the defendant in error of the security for the payment of the note, or debt evidenced by it. There was a further allegation of the insolvency of Wiegand & Stratman and each of them. The answer of the sheriff denied each and every allegation of the petition, except that there was a firm doing business under the name and style of Wiegand & Stratman, and that the members composing the firm were August Wiegand and Bernard Stratman, and the allegation in relation to insolvency, and alleged affirmatively that at the time he took and sold the goods and chattels described in the petition he was sheriff of Madison county, and did so as such officer and by virtue of an execution issued by the county judge of the said county upon a judgment which had been rendered in the county court in favor of Fred Schelly and against Wie-

Schelly v. Schwank.

gand & Stratman. The reply filed was a general denial. Before the trial of the cause the execution creditor, Fred Schelly, was substituted as defendant for and instead of George Davis. The case was tried to the court and a jury, the jury returning a verdict in favor of defendant in error, and after motion for new trial, filed on behalf of the adverse party, was submitted and overruled, judgment was rendered on the verdict and the case has been presented to this court for review.

It is assigned for error in the petition that "the court erred in giving the first, third, and fourth instructions asked by the plaintiff." In the motion for new trial this error was stated as follows: "The court erred in giving the instructions asked for by the plaintiff, to all of which the defendant then and there duly excepted." So far as the record discloses, there were but three instructions by request of defendant in error, and in the argument in the briefs filed by counsel for plaintiff in error it is not claimed that the third one was erroneous. All objection to it is therefore waived, and after examination we are satisfied that this instruction was correct and applicable, and, following the rule of this court, that where several instructions are grouped in an assignment of error relating to their giving, they will be examined no further than to ascertain that any one of them was correctly given, this assignment will not be further considered. (*Jenkins v. Mitchell*, 40 Neb., 664.)

Another allegation of the petition in this court is that "the court erred in refusing to give the first, second, and third instructions asked by defendant in the lower court." An examination of the instructions referred to in this assignment discloses that one, if not more of them, was fully covered by the instructions given by the court on its own motion, and this being determined, they will not be further considered, having been assigned collectively. (*Hewitt v. Commercial Banking Co.*, 40 Neb., 820; *Murphy v. Gould*, 40 Neb., 728.)

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It is claimed that the court erred in admitting certain testimony. This is not referred to in any assignment in the petition in error unless it was intended to be included in the general statement that "there was error of law occurring at the trial, duly excepted to." This assignment was insufficient to obtain a review of the rulings of the district court on the admission of evidence. (*Houston v. City of Omaha*, 44 Neb., 63; *Risse v. Gasch*, 43 Neb., 287; *Mullen v. Morris*, 43 Neb., 592; *Murphy v. Gould*, 40 Neb., 728.)

The only further assignment of error is that the verdict is not sustained by sufficient evidence. From an examination of all the testimony it appears that there was a conflict on some of the points at issue in the case, but we are satisfied of its sufficiency to sustain the findings and verdict of the jury, including its conclusion upon the question of the amount of the recovery as stated in the verdict. It is the established rule that where there is ample evidence to sustain a verdict, or it is not clearly or manifestly wrong, it will not be disturbed; hence the verdict in this case must stand. (*Prewitt v. York County*, 43 Neb., 267.)

The judgment of the district court is

AFFIRMED.

A. H. WEIR & COMPANY, APPELLEE, V. SUSIE L. THOMAS, APPELLEE, IMPEADED WITH SARAH F. HARRIS, APPELLANT, ET AL.

FILED APRIL 4, 1895. No. 6206.

Mechanics' Liens: MORTGAGES: PRIORITIES. In a contest for priority as between a mortgage filed for record August 21, 1890, and a claim for a mechanic's lien in which the material was alleged to have been delivered "between August 21, 1890, and January 22, 1891," *held*, that the word "between" excluded the 21st, from which it resulted that the lien of the mortgagee was senior and superior to that of the material-man.

APPEAL from the district court of Lancaster county.
Heard below before TIBBETS, J.

Harwood, Ames & Pettis, for appellant.

Mockett, Rainbolt & Polk, S. L. Geisthardt, Darnall & Babcock, and *J. S. Kirkpatrick*, contra.

RYAN, C.

In its petition the firm of A. H. Weir & Co. alleged that in pursuance of a contract with F. J. Andrews it had furnished material for a building on and between August 21 and January 22, 1891, for which, after crediting all payments, there still remains due a balance of \$404.30, for which sum, with interest, there was a prayer for a foreclosure. Sarah F. Harris, one of the defendants, appeals from the decree, which postponed her rights to those of A. H. Weir & Co. Her mortgage on the premises, against which the mechanic's lien was claimed, was filed on August 21, 1890. In the itemized account attached to the affidavit filed for a lien there were descriptions of lumber, but no date was specially given in connection with any of these items earlier than August 23, 1890. To establish its priority over this mortgage, however, the following language, with which the statement of account was prefaced, was relied upon by plaintiff: "Lincoln, Neb., December 29, 1890. Estimate on original bill made by A. H. Weir & Co. For Susie L. Thomas job. F. D. Andrews, contractor. Delivered between August 21, 1890, and January 22, 1891." If this language fairly implies that the two dates named are included by the use of the word "between," the finding of the district court adverse to the mortgage in question is sustainable, otherwise not.

In the case of *Bunce v. Reed*, 16 Barb. [N. Y.], 347, was involved the definition of the word "between," found in the same connection as above. Judge Hand said: "The

affidavit of publication is defective in this case unless the words 'between the 7th day of December, 1850, and the 1st day of March, 1851,' supply the defect. The 7th day of December was Saturday, and that was the last day notice could have been published. It has been decided that 'till' includes the day to which it is prefixed. (*Dakins v. Wagner*, 3 Dowl. P. C. [Eng.], 535.) But 'between,' when properly predicable of time, is intermediate, and strictly does not include in this case either the 7th of December or 1st of March. Between two days was exclusive of both. (*Atkins v. Boylston Fire & Marine Ins. Co.*, 5 Met. [Mass.], 440.) The affidavit does not show a publication eighty-four days."

In *Atkins v. Boylston*, *supra*, the coffee insured was "to be shipped between February 1 and July 15, 1840," under the terms of the policy. In the opinion of the court there was the following language: "It is undoubtedly true that the word 'between' is not always used to denote an intermediate space of time or place, as the plaintiff's counsel has remarked. We speak of a battle between two armies, a combat, a controversy, or a suit at law between two or more parties; but the word thus used refers to the actions of the parties, and does not denote locality or time. But if it should be said that there was a combat between two persons between two buildings, the latter word would undoubtedly refer to the intermediate space between the buildings, while the former word would denote the action of the parties. But it was argued that the word 'between' is not always used as exclusive of the termini when it refers to locality. Thus, we speak of a road between one town and another, although the road extends from the center of one town to the other; and this, in common parlance, is a description sufficiently intelligible, although the road in fact penetrates each town. But if all the land between two buildings or between two other lots of land be granted, then certainly only the intermediate land between the two lots of land, or the two buildings would pass by the grant.

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And we think the word 'between' has the same meaning when it refers to a period of time from one day, month, or year to another. If this policy had insured the plaintiff's property to be shipped between February and July, it would clearly not cover any property shipped in either of those months. So we think the days mentioned in the policy are excluded. We think the word 'between' has the same meaning in this respect as the words used in the second policy. In that policy the goods insured are to be shipped subsequently to the 14th of July and prior to the 15th of October next following. This would be construing the contract according to the most common meaning of the word 'between,' and there is nothing in the contract to intimate that the word was used in any other sense."

This meaning of the word "between" not only is sanctioned by the only adjudicated cases which we have been able to find, but as well it has the approval of our own judgment. From this it inevitably results that the lien in favor of A. H. Weir & Co. related back from the time of its filing so as to include August 22 and exclude August 21. The mortgage to Sarah F. Harris, which was filed for record on August 21, should therefore have been decreed senior and superior to the mechanic's lien of A. H. Weir & Co. This conclusion seems to be somewhat at variance with the following language at the close of the opinion of this court in *Noll v. Kenneally*, 37 Neb., 885, to-wit: "The fair inference to be drawn from the statement in the account for the lien we are considering is that the materials were furnished between the dates therein named and that the last were furnished on the date last given. (See *Manly v. Downing*, 15 Neb., 637; *Hayden v. Wulfing*, 19 Mo. App., 353; *Bangs v. Berg*, 48 N. W. Rep. [Ia.], 90; *Johnson v. Stout*, 44 N. W. Rep. [Minn.], 534.)" An examination of the cases cited will show that they support the proposition that when it appears from the statements in the affidavit, or from the itemized account thereto attached, that the labor or ma-

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terial was furnished within the prescribed statutory time immediately antecedent to filing the same, it is a sufficient compliance with the requirements of the mechanic's lien law to render such filing effective, and as this was the only question in dispute which involved the sufficiency of the sworn statements filed to secure a lien, such language as implies more is but *dictum*. This explanation is made upon the suggestion of the writer of the opinion referred to and has his entire approval.

The judgment of the district court, in so far as thereby the rights of A. H. Weir & Co. were adjudged superior to the lien of the mortgage made to Sarah F. Harris, is reversed and this cause is remanded to said district court with directions to modify its decree accordingly.

REVERSED AND REMANDED.

OMAHA STREET RAILWAY COMPANY V. MELVIN BAKER,
BY HIS NEXT FRIEND, MARGARET FERRIS.

FILED APRIL 4, 1895. No. 6190.

Street Railways: NEGLIGENCE OF MOTORMAN: PERSONAL INJURIES: EVIDENCE. The evidence in this case considered, and found not to sustain the verdict upon which judgment was rendered.

ERROR from the district court of Douglas county. Tried below before FERGUSON, J.

John L. Webster, for plaintiff in error.

C. A. Baldwin and Weaver & Giller, contra.

RYAN, C.

On the 15th day of February, 1891, Melvin Baker, a lad between thirteen and fourteen years of age, was per-

manently injured by a car operated by the Omaha Street Railway Company. In a suit for damages on account of such injuries there was a verdict and judgment against the railway company in the district court of Douglas county for the sum of \$2,500. Melvin Baker, as a messenger for the Western Union Telegraph Company, was required to take a street car going southward on the Sixteenth street line. For this purpose he came out of the alley between Douglas and Farnam streets, across which the Sixteenth street car line of plaintiff in error ran. The motor train on which he proposed riding had just passed when Melvin came out of the alley, and that he might catch it he ran diagonally in a northwesterly direction across a street railway track and immediately in front of a motor train thereon, consisting of two cars moving northward. When the south-bound motor train was nearly opposite the one bound northward, Melvin with one hand had seized the hand-hold on the rear of the foremost of the two cars going southward, and, with the other, the guard rail of the rear platform of the same car, and was still on the ground, when, as he claims, the motorman on the train going northward seized him by the neck, caused him to lose his holds and fall beneath the wheels of the rear car of the north-bound motor train. It is not necessary to determine whether or not the plaintiff in error would be liable if its sole ground of defense was that it was not answerable for an act of the motorman on the north-bound train entirely foreign to the scope of his duties. This proposition will not therefore be discussed. The evidence of the lad as to the agency which directly caused his fall was as follows:

Q. Had you one foot on the step?

A. No, sir.

Q. What then?

A. I felt something jerk me by the neck and I had to let loose. The car I had hold of was in motion and I could not hold on any longer.

Q. What was there, if anything, on the track going north?

A. A motor. * * *

Q. What did you say caused you to let go your hold?

A. Something grabbed me by the neck. I couldn't say sure it was the motorman, for I don't know whether there was anybody else on the front platform or not.

Q. State what you mean to say. Whether some person took hold of you by the neck?

A. Yes, sir; some person did.

Q. Where did he take hold of you?

A. Right in in the middle of the neck, on my coat.

Q. Where was the person, whoever it was, that took hold of your clothing by the neck?

A. On the front platform.

Q. Of what?

A. Of the motor.

Q. Going which way?

A. North.

Q. When you let go, under these circumstances, what became of you then?

A. I fell.

Q. Tell the court and jury what condition you fell; that is, after you fell how did you lie?

A. With my head to the south. * * *

Q. Which way was your head?

A. South.

Q. Tell the jury when you fell, and, with your head to the south, whether your face was up or down.

A. Up.

Q. What then happened to you after you fell and were on the ground and lying in that condition?

A. I just felt the wheel hit my arm; it just held there for a little while and then passed on over.

Q. Which arm did it catch?

A. The right arm.

It is not questioned that the boy's arm was very seriously injured by the wheel passing over it in the manner described. On his cross-examination, the testimony of Melvin was that he did not have a chance to look back to see who had caught him by the neck; that he did not see who it was behind him that caught hold of him and did not know where the person was standing that "grabbed hold" of him. Mrs. Dale was a witness for the plaintiff in the district court and testified that with her husband she was riding on the west side of the foremost car of the motor train going northward, and that, looking out of the front window, she saw the boy crossing the track toward the northwest; that she was somewhat scared by his attempting to cross the track with the north-bound train so close, moving toward him; that it was evident to her that he could not cross both tracks before the south-bound train would reach him; that it was her impression that no one was on the front platform of the car on which witness was riding except the motorman; that when she saw the boy crossing the track he was about ten or fifteen feet ahead of the car in which she was riding. The testimony of Mrs. Dale's husband was in substantial accord with that of his wife, though he ventured no statement as to any one being with the motorman on the platform. In addition to what his wife had sworn he testified that after the boy had crossed the track in front of the train on which the witness was riding he did not see the boy, and that "almost immediately the other car held up and ours put on the brakes, and I heard a cry, a boy cry at the rear end of our car—of our train." The motorman of the north-bound train testified that when the boy crossed in front of him he not only set the brake but reversed his motor to avoid injuring the boy, and that he did not take hold of him in any manner whatever. In relation to the efforts of the motorman to avoid running against the boy while he was crossing the track there is no question made, for whatever the degree of care was which

was exerted it was conceded that the result was that he reached the south-bound train uninjured—such efforts if made, however, precluded the possibility of his seizing the boy. The right of recovery on plaintiff's own theory was wholly dependent upon the establishment of the alleged misconduct of the motorman of the north-bound train in causing the boy to lose his holds on the car moving southward. The evidence of the boy, bearing upon this proposition, has been quite fully set out, because he alone gave testimony to establish it. It must be conceded from his own statements that he did not attempt to take the car at the street crossing, the only place at which stops were made to receive passengers. From his testimony, taken as a whole, it does not appear that he testified that the motorman seized him, as of a fact of which he had knowledge. On the contrary, he expressly admitted that he could not say who it was, but apparently argumentatively he asserted that it was the motorman of the north-bound train. No one else testified on this subject but the motorman himself, and he flatly denied that he touched the boy in any way. The requirement of a showing that the accident was caused by the negligence or misconduct of the street car company, or its employes, was hardly met by the testimony of the defendant in error as to questions of fact, even conceding his counsel's theory of the law to be correct. There was no direct evidence that the motorman touched this boy. True, the boy testified that he did, but he admits that he could not, and did not know whether it was the motorman or not. In this condition of his testimony certain circumstances have a great weight in showing that this lad mistakenly ascribed the blame for his misfortune to the motorman on the north-bound train, for his own statements were that when he was thrown to the ground his face was up and his head was toward the south. There is no conflict in the evidence that both the north-bound train and the south-bound train were in motion when the accident occurred.

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This being true, if the motorman on the train northward-bound caught this boy by the neck and threw him to the ground, the fall must have been in the direction in which said motorman himself was moving, and it was therefore unavoidable in such case that the boy's head should have been toward the north, probably with the face upward. If, on the other hand, the impelling force was moving southward, the boy would have fallen with his head toward the south. In the hurry of crossing to avoid the close approaching train from the south, and the confusion resulting from finding himself suddenly between two trains moving in opposite directions, it was perhaps natural that this boy could scarcely understand how the swiftly following accident happened. That his impression that the motorman seized him was but conjecture is evident from his own statement; that in this conjecture he was mistaken, is quite obvious from the circumstances just noted. As there was no sufficient evidence to sustain the verdict the judgment of the district court is

REVERSED.

LOUIS H. KORTY ET AL. V. JAMES K. MCGILL ET AL.

FILED APRIL 4, 1895. No. 6008.

1. **Principal and Surety: BONDS.** The mere fact that a principal in a proposed bond expressed to an agent of the proposed obligee an opinion as to the necessity of paying off an existing indebtedness to a third party, for which the proposed sureties were then liable, before requesting said proposed sureties again to become liable as such on the proposed bond, did not constitute such payment an indispensable condition precedent to the acceptance of the proposed bond by the obligee therein named.
2. ———: **GUARANTY: BONDS.** Where the principal has paid for all goods bought before the execution of a bond guarantying that he would pay for all merchandise by him purchased, the fact of

such purchase before execution of the bond is immaterial to the liability of the sureties for goods sold their principal after they had signed his bond.

3. **A bond of guaranty of payments for goods to be purchased by the principal, in which it was provided that the obligee should give a credit of sixty days therefor, was not rendered inoperative as against sureties thereon by the obligee taking promissory notes "in making settlements" without reference to a limitation of sixty days, where the taking of promissory notes "in making settlements" was in general terms expressly authorized by the instrument itself.**
4. **Guaranty: TERMINATION OF CONTRACT: NOTICE.** A guaranty of payments by the principal therein named contained a provision that the contract might be terminated by the party to whom the payments were guarantied upon his giving sixty days' notice of an intention to annul the same for any reason other than failure of the principal to perform any prescribed conditions, one of which was the making of payments at certain times. *Held*, That default in the condition specially referred to dispensed with the giving of notice as a condition precedent to the exercise of the right to terminate said contract.

ERROR from the district court of Douglas county. Tried below before FERGUSON, J.

Howard B. Smith, for plaintiffs in error.

Jacob Fawcett, contra.

RYAN, C.

This action was brought in the district court of Douglas county by the defendants in error against Joseph D. Porter, Louis H. Korty, and William J. Mount for a balance due from Porter to the defendants in error. There was a verdict and judgment as prayed. Joseph D. Porter refused to join plaintiffs in error in this proceeding and was, therefore, named as one of the defendants in error. The plaintiffs in error signed as sureties a bond in which Joseph D. Porter was principal and the firm of James K. McGill & Co. was the obligee. In this bond it was re-

cited that the obligee had agreed to sell Joseph D. Porter, during its pleasure, Hammond type-writers, etc., to be sold by Porter in certain defined territory, and that McGill & Co. had agreed to give sixty days' notice of its intention to annul its contract with Porter for any reason other than the failure of said Porter to keep and perform any condition of said obligation. The sales of Porter, it was provided, should be at a discount of thirty per cent from retail price, and, as recited, it had been agreed by the obligee that a credit of sixty days should be given on goods sold from time to time. Following the above provision was this language: "And, whereas, the said James K. McGill & Co. may, at different times, lend certain type-writers to said Joseph D. Porter; and, whereas, in making settlements from time to time the said Joseph D. Porter may give to the said James K. McGill & Co. promissory notes for amounts due to them on such settlements: Now, therefore, if the said Joseph D. Porter shall well and faithfully attend to the said business and shall well and faithfully pay to said James K. McGill & Co. the full amount due from time to time, and shall well and faithfully pay all notes given to them in settlements as aforesaid, whether said notes are still held by said James K. McGill & Co., or have been assigned by them, and shall, when requested by said James K. McGill & Co., turn over to them, their agents or assigns, all borrowed type-writers or consigned goods, and shall well and faithfully keep and perform all of the agreements herein contained and any and all future agreements which he may make with said James K. McGill & Co. in relation to the aforesaid business, then this obligation to be void; otherwise to be and remain in full force and effect."

The sureties contend that the above bond was presented to McGill & Co. by Mr. Porter without authority and by said firm was received with knowledge of that fact, wherefore it results that it was never legally delivered and

never became of binding force. This contention is founded upon the fact that previous to the delivery of the bond sued upon the plaintiffs in error were sureties for Mr. Porter upon a like bond to the Hammond Company as obligee, on which the principal and sureties were still liable to the amount of about \$400, which liability, as is claimed, was to have been paid before the bond sued on was to be delivered. It is said in argument that the testimony of Mr. Porter was to the effect claimed. The statement of Mr. Porter to the agent of the firm of McGill & Co. was that it would be necessary for him, Porter, to square up this \$400 before he could go to Korty and Mount and ask them for their signature. This did not imply that such payment was in contemplation of the parties a condition precedent to the delivery of the present bond. In relation to the liability of the sureties for goods sold before the delivery of the bond it is to be borne in mind that the aggregate amount of sales to Mr. Porter, between February 11, 1889, and March 6, 1890, was \$7,427.85. The credits within the same period amounted to \$6,190.34. On the 21st day of August, 1889, there seems, from the statement of the account, to have been had some sort of an examination of the condition of affairs between the principal and the obligee named in this bond. At any rate this statement shows that at that time there was owing but a balance of \$81.01. On September 2, immediately following, there was paid in notes more than sufficient to cover the above sum and such further indebtedness as meantime had been contracted. Whether or not the items ordered before the bond was accepted would have been covered by its terms, therefore, practically becomes immaterial, for in fact they have been paid by the principal.

It is urged that there were such extensions of credits beyond the limit fixed by the terms of the bond that the sureties were thereby discharged. There was in the bond only an agreement recited to have been made by McGill &

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Co. that said firm would give a credit of sixty days on type-writers and other articles sold the principal obligor. Later on, as a preamble to the conditions, it was recognized as probable that Mr. Porter might give to the said James K. McGill & Co. promissory notes in making settlements for amounts due. There was no description attempted of the promissory notes which would be available for use in the settlements contemplated. One condition of the bond was that the principal should well and faithfully pay all notes given in settlement as aforesaid. In argument it is insisted that the words "notes given in settlements as aforesaid" limited the duration of the notes to sixty days, for, it is reasoned, a credit of that length of time was provided for in the bond and during that time the indebtedness might be evidenced by notes, and that for notes of that kind alone the sureties were liable. If the language had been in effect that, for balance on account, or on settlements of account between the principal and the obligee, notes of the former to the latter might be given to cover the sixty days time contemplated, there would have been force in the contention under consideration. But such was not the case, neither is there anything in the evidence to indicate that, in fact, notes were ever taken to cover the sixty days credit to which Mr. Porter was entitled. There seems to have been turned in to the company certain notes for which credits were given on account. Some of these may have been paid, probably were, but there were others which, having been discounted at the bank and not paid at maturity, were taken up by James K. McGill & Co. Of this class there was only one given by Mr. Porter, which note was for \$300, on which there was paid \$200. This action was not brought on these notes, but on an account current between McGill & Co. and Joseph D. Porter in which the several notes figured simply as items of debit or credit. Since the several notes taken on settlements were not intended to cover the sixty days credit pro-

vided, and apparently were given or indorsed to the obligee as conditional payments, there was no ground for the assumption that by the taking of these notes a credit different from that contemplated was given to the principal, resulting in the release of his sureties. In our view, it was not necessary that sixty days' notice in writing should have been given of the intention of McGill & Co. to terminate the relations between that firm and the principal obligor, for the evidence shows that the relations were terminated because of his default,—a condition of affairs which by the terms of the bond itself dispensed with the necessity of giving notice. This being true, there was no error in excluding evidence which tended to show the existence of a valuable good-will of trade thereby destroyed which by Mr. Porter had been pleaded as a counter-claim.

There are asserted miscellaneous grievances, such as a remark of the court upon presentation of a motion to instruct that no ground of counter-claim had been established; that said court very much doubted whether there was sufficient evidence, but that the motion would be overruled. This language was not intended for the jury, and when it was excepted to there was a prompt statement to that effect addressed directly to the jury. In the instructions the duty of jurors to disregard all remarks which had been made by the court during the trial with reference to questions of fact was very fully and emphatically stated. Under these circumstances it is not believed possible that the result was at all affected by the language of which complaint is now made. Among the general complaints made there is one as to the striking out of certain evidence after it had been admitted. If there was error in this, plaintiffs in error cannot avail themselves of it, for no exception was taken to any ruling of that character. Speaking for himself alone, the writer hereof suggests that motions of this character are of very doubtful advantage, for, if the motion is sustained, the striking out is simply from the record.

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No power short of Omnipotence can in fact withdraw it from the jury. If a party has procured it to be stricken from the record, he is in a very awkward situation to insist that, nevertheless, the error appears in the record. It is not necessary to consider separately the several errors assigned and argued as to the giving or refusal to give instructions. The various propositions involved have already received full consideration and there exists no necessity for amplification, merely to illustrate just how the different questions were presented.

There were submitted special interrogatories, which were fully answered in consonance with the general verdict. Each of these was sustained by sufficient evidence, and the judgment upon the general verdict is

AFFIRMED.

**OMAHA FIRE INSURANCE COMPANY V. ANNA BERG
ET AL.**

FILED APRIL 4, 1895. No. 5376.

1. **Instructions: EXCEPTIONS: REVIEW.** The refusal to give an instruction requested cannot be reviewed in the absence of an exception.
2. **Review: EVIDENCE: OMISSIONS FROM BILL OF EXCEPTIONS.** The assignment that the verdict is not sustained by the evidence cannot be considered, where from the bill of exceptions it appears, without question, that therefrom has been omitted evidence which may be important.
3. **Trial: ADMISSION OF EVIDENCE: REVIEW.** The ruling sustaining an objection to a question cannot be reviewed where there was made no tender of evidence which an answer, if permitted, would disclose.
4. **Pleading: MOTION TO STRIKE: HARMLESS ERROR.** It was not error to overrule a motion to strike out portions of a petition where, by reason of such ruling, it does not appear that the moving party was prejudiced.

44	522
49	323
55	240

44	523
58	633

5. ———. Courts very properly refuse affirmatively to direct what language must be employed in drafting pleadings.

ERROR from the district court of Adams county. Tried below before GASLIN, J.

Hewett & Olmstead and *A. J. & W. S. Poppleton*, for plaintiff in error.

Capps & Stevens, contra.

RYAN, C.

This action was begun in the county court of Adams county. Afterwards it was tried in the district court, to which it had been taken by appeal. There was a verdict against the insurance company for the sum of \$200, on which judgment was duly rendered. The cause of action upon which plaintiff recovered, it was stated in the petition, had its existence by reason of the facts that the insurance company had insured Louis Carroll against loss or damage by fire happening to a stallion owned by Carroll; that during the time covered by the policy there was a loss of the horse insured, after which time Carroll assigned to the plaintiffs in the district court one-half of the amount due as aforesaid; that with notice of this assignment the insurance company settled with Carroll, intentionally ignoring said assignment, and that the insurance company has ever since refused to pay the sum of \$200, being the one-half of the insurance money due, which one-half was assigned as aforesaid, or to pay any other sum.

In the motion for a new trial there was no assignment with reference to instructions except that "the court erred in refusing to give the instructions asked for by the defendant." In the record we find but one instruction of the class designated. In respect to it there was a minute made of the words "rejected to by the court," also of the word "refused," but there was no exception noted, consequently the alleged error is not now properly presented.

In the petition in error it is asserted that the verdict was not sustained by the evidence, but we cannot consider this assignment, for from the bill of exceptions itself it appears that there were introduced in evidence certain exhibits designated as "Exhibit E," "Exhibit F," and "Exhibit G." True, these were copies of the petition, answer, and reply filed in the county court, yet in the answer indicated there may have been admissions of very important facts alleged in the petition. Under these circumstances we cannot say that the verdict was without support of sufficient evidence.

It is insisted that there was error in excluding the evidence of Mr. Roundtree, an adjuster of the insurance company, as to his reason for making a settlement with Carroll who had not possession of the policy. We cannot conjecture how it was possible that an answer to this inquiry would be important, and, as there was no offer of proof proposed to be made by such answer, we cannot review the ruling of the court in sustaining an objection to the question propounded.

It is urged that there was error in refusing to strike out certain designated parts of plaintiff's petition for the reason that the parts objected to were redundant and immaterial. In general terms these criticised averments were as to the ownership of the horse when the policy was issued; the conditions of the policy; the description of the place where the horse was when the damage was sustained; the knowledge of the insurance company of the interest of the assignee in the loss when, nevertheless, payment was made to Carroll; the delivery of the policy to plaintiff; and the contemporaneous agreement between plaintiff and Carroll that a certain firm of attorneys at law should collect the loss and therefrom pay \$200 to plaintiff; and the averments that, notwithstanding the full time for making settlement had long since expired, nevertheless that such settlement had not been made. It may be that it was not required that all the facts should have been alleged as fully

as was done, yet we cannot understand how the insurance company was prejudiced by this, perhaps unnecessary particularity. In the above generalization it was impossible to place the second paragraph of the motion to strike, for the reason that this paragraph was to strike from the second paragraph of the petition, immediately following the description of the business for which the insurance company had been organized, the words "as such company, in the legitimate course of its business, the defendant herein did, on the 12th day of June, 1891, insure the above described horse," for, connected with this language of the motion, there were in brackets the words "and insert in lieu thereof 'a certain horse belonging to Louis Carroll.'" No authority has been cited in support of this proposed substitution of other language for that chosen by the pleader who drew the petition. It is conceivable that such a right of substitution might possibly be abused, though in this particular case it would doubtless have occasioned no injury. It seem to us that if an attorney for a defendant discovers in the petition of his adversary language for which he wishes to substitute something better, the only course open is privately to suggest and urge the adoption of the proposed amendments. If, upon being so reasoned with, plaintiff's attorney should persist in holding his own the better chosen language, courts cannot interfere, however grave his mistake, for the duty of using the very best language is an obligation of so imperfect a nature that it cannot be judicially enforced.

Upon a careful review of the entire record we have been able to discover no error and the judgment of the district court is

AFFIRMED.

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44	625
45	156
44	625
45	76
46	80
44	625
45	76
46	713
47	774
44	625
45	132

**LINCOLN & BLACK HILLS RAILROAD COMPANY V.
WILLIAM F. SUTHERLAND ET AL.**

FILED APRIL 4, 1895. No. 6238.

- 1. Surface Water: RAILROAD COMPANIES: NEGLIGENCE IN CONSTRUCTION OF EMBANKMENT: EVIDENCE: WITNESSES.** A draw some seven miles in length crossed the premises of a farmer. The surface waters produced by rains and melting snows were wont to run into this draw from the surrounding territory and thence find their way to the Platte river. A railroad company constructed its road-bed across the premises and built an embankment, without culvert or opening over the draw. In a suit by the farmer against the railroad company for damages for negligently constructing the embankment without an opening, whereby the surface waters were stopped and overflowed the farmer's land and destroyed his crop, *held*, (1) that the evidence sustained the finding of the jury that the railroad company negligently constructed its embankment across the draw; (2) that such negligence of the railroad company was the proximate cause of the damages sustained by the farmer; (3) that nothing in the case made the production of expert testimony a necessity; (4) that any person who was acquainted with the draw and the manner in which the embankment was constructed, and the manner in which it affected the waters in the draw, was a competent witness to state such facts; and that it was for the jury to say, from all the facts and circumstances in evidence in the case, whether the embankment was negligently constructed.

——: **DAMAGES.** The doctrine of this court is the rule of the common law, that surface water is a common enemy, and that an owner may defend his premises against it by dike or embankment, and if damages result to adjoining proprietors by reason of such defense, he is not liable therefor.

——: ———. But this rule is a general one and subject to another common law rule, that a proprietor must so use his own property as not to unnecessarily and negligently injure his neighbor.

——: **NEGLIGENCE: DAMAGES.** Therefore, every proprietor may lawfully improve his property by doing what is reasonably necessary for that purpose, and unless guilty of some act of neg-

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ligence in the manner of its execution, will not be answerable to an adjoining proprietor, although he may thereby cause the surface water to flow on the premises of the latter to his damage; but if, in the execution of such enterprise, he is guilty of negligence, which is the natural and proximate cause of injury to his neighbor, he is accountable therefor. *Anh-user-Busch Brewing Association v. Peterson*, 41 Neb., 897, followed and re-affirmed.

ERROR from the district court of Merrick county. Tried below before MARSHALL, J.

The facts are stated by the commissioner.

A. W. Agee and J. W. Deweese, for plaintiff in error:

The owner of the lower estate may, without incurring liability for damages, erect a dike or embankment to prevent the flow of surface water on his land, even though it it may cause the water to back up and overflow adjoining lands. (*Morrison v. Buckport*, 67 Me., 353; *Murphy v. Kelley*, 68 Me., 521; *Sweet v. Cutts*, 50 N. H., 439; *Beard v. Murphy*, 37 Vt., 104; *Luther v. Wennisimmet Co.*, 9 Cush. [Mass.], 171; *Emery v. City of Lowell*, 104 Mass., 16; *Buffum v. Harris*, 5 R. I., 253; *Wakefield v. Newell*, 12 R. I., 75; *Wadsworth v. Tillotson*, 15 Conn., 366; *Gillett v. Johnson*, 30 Conn., 180; *Adams v. Walker*, 34 Conn., 466; *Chadeayne v. Robinson*, 11 Atl. Rep. [Conn.], 592; *Waffle v. New York C. R. Co.*, 58 Barb. [N. Y.], 413; *Wagner v. Long Island R. Co.*, 2 Hun [N. Y.], 633; *Boulsby v. Speer*, 2 Vroom [N. J.], 351; *Limerick & Colebrookdale Turnpike Co.'s Appeal*, 80 Pa. St., 425; *Atchison, T. & S. F. R. Co. Hamner*, 22 Kan., 763; *Cairo & V. R. Co. v. Stevens*, 73 Ind., 278; *Pettigrew v. Evansville*, 25 Wis., 223; *Fryer v. Warne*, 29 Wis., 511; *Lessard v. Stram*, 22 N. W. Rep. [Wis.], 284; *Johnson v. Chicago, St. P., M. & O. R. Co.*, 50 N. W. Rep. [Wis.], 771; *O'Connor v. Fond du Lac, A. & P. R. Co.*, 52 Wis., 526; *Burke v. Missouri P. R. Co.*, 29 Mo. App., 370; *Schneider v. Mis-*

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souri P. R. Co., 29 Mo. App., 68; *Munkers v. Kansas City, St. J. & C. B. R. Co.*, 72 Mo., 514; *Barnes v. Sabron*, 10 Nev., 218; *Davis v. Londgreen*, 8 Neb., 43; *Pyle v. Richards*, 17 Neb., 181.)

When plaintiff in error obtained the right of way and paid the damages, this included any damages which might occur by reason of the obstruction of the flow of surface water from one portion of the lands of defendants in error to another portion thereof, by the grading of the road-bed. (*Wallace v. Columbia & G. R. Co.*, 12 S. E. Rep. [S. Car.], 815.)

The plaintiff in error, even if bound to so construct its road-bed as to permit the surface water which might be reasonably expected to accumulate on the lands of the defendants in error, to flow over its right of way, yet it is not bound to provide against such extraordinary rainfalls or freshets as could not be reasonably apprehended from careful observation and consideration of the history of the country, by a skillful engineer. (*Union Trust Co. v. Cuppy*, 26 Kan., 762; *Baltimore & O. R. Co. v. Sulphur Spring Independent School District*, 96 Pa. St., 65.)

W. T. Thompson, contra:

The company is liable for a failure to permit some egress for the surface water. (*Wharton v. Stevens*, 50 N. W. Rep. [Ia.], 562; *Vannest v. Fleming*, 79 Ia., 638; *Palmer v. Waddell*, 22 Kan., 352; *Kelly v. Dunning*, 39 N. J. Eq., 482; *Livingston v. McDonald*, 21 Ia., 160; *Anderson v. Henderson*, 124 Ill., 164; *Gormley v. Sanford*, 52 Ill., 158; *Gillham v. Madison County R. Co.*, 49 Ill., 484; *Peck v. Goodberlett*, 109 N. Y., 180; *Jeffers v. Jeffers*, 107 N. Y., 650; *McCormick v. Horan*, 81 N. Y., 86; *Martin v. Riddle*, 26 Pa. St. 415; *Kauffman v. Griesemer*, 26 Pa. St. 407; *Taylor v. Fickas*, 64 Ind., 173; *Ogburn v. Connor*, 46 Cal., 346; *Lord v. Carbon Iron Mfg. Co.*, 42 N. J. Eq., 157; *Boyd v. Conklin*, 54 Mich., 583; *Tootle v.*

Clifton, 22 O. St., 247; *Bates v. Westborough*, 151 Mass., 174; *Fremont, E. & M. V. R. Co. v. Marley*, 25 Neb., 138; *Stewart v. Schneider*, 22 Neb., 286; *Kearney v. Thoemason*, 25 Neb., 147.)

The position taken by counsel that the damages paid for the right of way through the lands of defendants in error included any damages which they might sustain by the stoppage of the flow of the surface water is erroneous. (*Fremont, E. & M. V. R. Co. v. Whalen*, 11 Neb., 585; *Fremont, E. & M. V. R. Co. v. Lamb*, 11 Neb., 592; *Jackman v. Missouri P. R. Co.*, 15 Neb., 524; *King v. Iowa M. R. Co.*, 34 Ia., 458; *Lehigh Valley R. Co. v. Lazarus*, 28 Pa. St. 203; *Patten v. Northern C. R. Co.*, 33 Pa. St., 426; *Fleming v. Chicago, D. & M. R. Co.*, 34 Ia., 353; *Delaware, L. & W. R. Co. v. Salmon*, 10 Vroom [N. J.], 299.)

RAGAN, C.

Sutherland Bros. owned the southwest quarter of section 25, township 14 north, and range 7 west of the 6th P. M., in Merrick county, and used and occupied said premises for farming purposes. Across this land, running in a northeasterly direction was a depression, called in this country a "draw." This draw was some seven miles in length. It headed or began some three miles southwest of the premises of the Sutherlands and emptied into Silver creek or some of its tributaries. This draw was not a running stream, but the waters from melting snows and rains which fell on a large area of land on either side of this draw drained into it and thence made their way through it and other channels to the Platte river. The Lincoln & Black Hills Railroad Company, a railway corporation of the state and hereinafter called the "Railroad Company," constructed its railroad bed and railway across this land of the Sutherlands and built across this draw a solid embankment of earth. At the place where the embankment was built

across the draw on the land of the Sutherlands the bottom of the draw was about a rod in width. Some time after the construction of this embankment by the Railroad Company a heavy freshet or rainfall occurred; the embankment stopped the waters which had collected in this draw and were making their way to the Platte river and threw them back upon the lands and crops of the Sutherlands and damaged them. The Sutherlands then brought this action against the Railroad Company to recover the damages which they had sustained by reason of the obstructed waters ruining their crops. The basis of their action against the Railroad Company was the negligent construction of the embankment across the draw, in this: that in constructing it they left no opening in the embankment through which the waters which had been accustomed to collect in said draw might escape. The Sutherlands had a verdict and judgment, and the Railroad Company prosecutes to this court a petition in error.

1. It is not argued here by counsel that the court erred in instructing the jury except in one instance, which will be hereinafter noticed; nor is there any argument that the court erred in the admission or rejection of any particular testimony. The entire argument relied upon here for a reversal is that the verdict and judgment are contrary to the evidence and the law of the case. The evidence shows, practically without conflict, the facts already stated. It shows that after this embankment was constructed across the draw, when the water stood in the draw at the embankment to the depth of a foot, that it would flow back a distance of five hundred feet; it shows also that the water would have to be almost two feet deep in the draw at the embankment before the water would begin to escape or run off in the ditches constructed by the Railroad Company for that purpose by the side of its track. We think that the evidence justified the finding of the jury that the Railroad Company negligently constructed its embankment

and road-bed across this draw. Counsel for the Railroad Company intimate in their argument that there is no evidence in the record that this embankment was not constructed in the usual manner of constructing embankments for railroads. In other words, the argument appears to be that in order to enable the Sutherlands to recover it was necessary for them to introduce the evidence of experts that this embankment was improperly or negligently constructed. We do not agree to this argument. We think that any person who was acquainted with this draw, and the manner in which the embankment was constructed, and the manner in which it affected the waters run into this draw, was competent to state the facts; and that it was for the jury to say, from all the facts and circumstances in evidence in the case, whether the embankment was negligently constructed. In other words, there was nothing in this case—if indeed there is in any case—which made the production of expert testimony a necessity. Another argument of counsel is that the loss sued for here was caused by an extraordinary rainfall and freshet—a rainfall unprecedented and such as the Railroad Company, at the time it constructed the embankment, was not required to anticipate. We think this argument is more untenable than the other. It is the freshet and rainfall the Railroad Company was charged with the duty of anticipating and providing against. We conclude, therefore, that the evidence sustains the finding of the jury that the Sutherland Bros. have sustained the damages for which they obtained judgment, and that such damages were the proximate result of the negligence of the Railroad Company in constructing its embankment across the draw in question without putting in a culvert or other opening in said embankment for the escape of the waters which were accustomed to run into said draw.

2. But it is argued that the judgment pronounced is contrary to the law of the case, because the Railroad Company, in constructing the embankment across the draw,

built it as it did to defend itself against surface waters; that surface water is a common enemy, and that the owner may defend his premises against surface water by dike or embankment, and if damages result to adjoining proprietors by reason of such defense, he is not liable therefor. The general rule contended for by counsel will not be questioned; but in this particular case the railroad company was not defending itself against surface waters by building this embankment. It did not build the embankment to keep the surface waters off its track, but it built it in order to put its road-bed across the draw on a level with its road-bed on either side thereof; and it neglected to put an opening in this embankment, perhaps because it was cheaper to build the embankment of dirt than it was to build a culvert of wood or stone. The question of the right of a proprietor to defend himself against surface waters has been several times before this court.

In *Davis v. Londgreen*, 8 Neb., 43, this court held: "The owner of a natural pond or reservoir, wherein the surface water from the surrounding land accumulates, and from which it has no means of escape except by evaporation or percolation, cannot lawfully, by means of a ditch, discharge such water upon the land of his neighbor, to his injury."

In *Pyle v. Richards*, 17 Neb., 180, Pyle's land lay immediately north of Richards'. A railroad bed and tracks lay on the line between the two pieces of land. Richards' land was lower than Pyle's. A ravine arose southwest of Pyle's land, extended northeast across it and across Richards' land. This ravine was fed by springs. During a portion of the year a very small stream of water flowed down the ravine and it was occasionally dry; and a large amount of surface water from melting snows or heavy rains ran into this ravine and thence found its way to the Nemaha river. Pyle built a dam across this ravine on his own land and cut a new channel so that the water which was in this ravine in wet weather was discharged through

a culvert under the railroad bed aforesaid, and thence on the lands of Richards. Richards sued Pyle for damages he had sustained by reason of the discharge of these waters on his lands, and the court held that Richards was entitled to recover.

In *Fremont, E. & M. V. R. Co. v. Marley*, 25 Neb., 138, the railroad company constructed its road-bed across Marley's land and cut ditches on its right of way on either side of its track for the purpose of draining its track and right of way of surface water. The surface water which collected in one of these ditches was carried down and discharged in large volumes on the land of Marley, and he sued the railroad company for damages by reason thereof, alleging, as the basis of his suit, the negligent construction of the ditches by the railroad company on its right of way, their capacity being insufficient to carry off and discharge the surface water accumulating therein. The jury found that Marley had been damaged by the discharge of this surface water through the ditches constructed by the railroad company and that the ditches were negligently constructed by being of insufficient capacity to properly carry off the surface waters. This court sustained the finding of the jury, holding that: "A party has no right to collect surface water in a ditch or drain and permit it to flow onto the land of another without the latter's consent, and if he do so he will be liable for the damages sustained."

In *Morrissey v. Chicago, B. & Q. R. Co.*, 38 Neb., 406, the railroad company built a solid embankment across the valley of the Nemaha river, from the bank of the river to the foot-hills. It put no culvert or opening in the embankment between the foot-hills and the river. At the time when the waters of the Nemaha river overflowed its banks, these overflow waters, it was claimed, were deflected by this embankment and flowed in a stream across the river and overflowed the lands of Morrissey on the opposite banks. For the damages he sustained by these over-

flowing waters he sued the railroad company, and based his action on the ground that it had negligently constructed its embankment. This court held that it would presume, in the absence of evidence on the subject, that the embankment was for railway purposes and properly constructed, and that the railroad company for the constructing of the embankment in a proper manner was not liable in damages to Morrissey because the embankment deflected the surface waters that overflowed his lands.

In *Lincoln Street R. Co. v. Adams*, 41 Neb., 737, Adams owned a lot in the city of Lincoln which fronted north on, and was on a level with, the street. Immediately west of his lot was a railroad embankment some feet higher than the level of his lot and the level of the street in front of his lot. Just east of Adams' lot was a hill over which the street passed. The railway company laid its track in this street and in so doing made a cut in the hill and made an embankment in the street in front of Adams' lot so as to bring their street railroad bed on a level with the railroad embankment west of Adams' lot. A heavy rain storm occurred and the surface water on the hill which had been wont theretofore to run off in all directions was collected in this cut made by the street railway company and discharged in a body on the lot of Adams. And as the street railway company where it graded up the street in front of Adams' lot had put no culvert or left no opening in said grade for the escape of such waters they were held in a body on Adams' lot and damaged it; for which damages he sued the railway company. Its defense was that in making the cut in the hill and the embankment in the street that it was defending itself against surface water, the common enemy, and was therefore not liable; but the jury found that the street railway, in constructing its embankment in front of Adams' lot, had negligently constructed it in not leaving an opening in it for the escape of surface waters, and the court sustained the finding of the jury.

These cases, and all of them, recognize the rule of the common law that surface water is a common enemy and that the proprietor may by embankment or dike or otherwise defend himself against its encroachments and will not be liable in damages which may result from the deflection or repulsion of such surface waters defended against, provided that the proprietor in making the defenses on his own land himself exercised ordinary care; but these cases, and all of them, also recognize the rule that a proprietor must so use his own property as not to unnecessarily and negligently injure another. The most lucid and logical statement of the rule under consideration that has been made by this court will be found in *Anheuser-Busch Brewing Association v. Peterson*, 41 Neb., 897, where POST, J., speaking for the court, said: "Every proprietor may lawfully improve his property by doing what is reasonably necessary for that purpose, and unless guilty of some act of negligence in the manner of its execution, will not be answerable to an adjoining proprietor, although he may thereby cause the surface water to flow on to the premises of the latter to his damage; but if in the execution of such enterprise he is guilty of negligence, which is the natural and proximate cause of injury to his neighbor, he is accountable therefor." This is the doctrine of this court and is the essence of and controls every other decision of this court on the subject. *Bunderson v. Burlington & M. R. R. Co.*, 43 Neb., 545, does not, nor was not intended to, announce a contrary doctrine. In the last case it was said that the overflow complained of was not attributable to the railway embankment. As the evidence in the case at bar shows that the railroad company in constructing its embankment across the land of Sutherland Bros. was guilty of negligence in not constructing in said embankment a culvert or an opening for the surface waters which accumulated in the draw to escape, and as such negligence was the proximate cause of the injury sustained by Sutherland Bros.,

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the judgment pronounced is not contrary to the law of the case.

3. Counsel for the plaintiff in error indulge in some criticisms upon the trial court in an instruction which it gave to the jury, because in such instruction the court, in speaking of the draw hereinbefore referred to, alludes to it as a "water-way," etc. We do not think the jury could possibly have been misled by this instruction, as the evidence, and all the evidence in the case, is to the effect that the draw was not a stream of flowing water, nor was it claimed or pretended to be such by Sutherland Bros.; and the court, by using the word "water-way," meant only the road or way which the surface waters took that accumulated in the draw; and the jury by the expression of the court did not understand him to be speaking of the draw as a flowing stream. There is no error in the record and the judgment of the district court is

AFFIRMED.

LINCOLN SHOE MANUFACTURING COMPANY V. GEORGE SEIFERT.

FILED APRIL 4, 1895. No. 6216.

Corporate Stock: CONTRACT OF SUBSCRIPTION. This case presents the same questions of law and fact as *Lincoln Shoe Mfg. Co. v. Sheldon*, 44 Neb., 279, and following that case the judgment of the district court is reversed.

ERROR from the district court of Lancaster county.
Tried below before HALL, J.

Thomas C. Munger, for plaintiff in error.

Ricketts & Wilson, contra.

RAGAN, C.

The Lincoln Shoe Manufacturing Company sued George Seifert in the district court of Lancaster county on a subscription made by him to the capital stock of the manufacturing company. Seifert demurred to the petition on the grounds that the facts stated therein did not constitute facts sufficient to constitute a cause of action. The district court sustained this demurrer and dismissed the action of the manufacturing company, and it has prosecuted to this court a petition in error.

The facts of this case are the same as those in *Lincoln Shoe Mfg. Co. v. Sheldon*, 44 Neb., 279, and on the authority of that case the judgment of the district court rendered in this is reversed and the cause remanded.

REVERSED AND REMANDED.

ROCHESTER LOAN & BANKING COMPANY ET AL. V.
LIBERTY INSURANCE COMPANY.

FILED APRIL 4, 1895. No. 6214.

44	537
47	721
48	750
44	537
49	820
51	308
44	537
57	542

1. **Insurance: PROOFS OF LOSS: WAIVER.** An insurance contract provided that the policy should be void if the interest of the insured in the premises was other than unconditional and sole ownership; if the insured premises be or become vacant or unoccupied and so remain for ten days; that in case of a fire the insured should furnish the insurer proof of loss. In a suit upon such policy the insurer interposed the defense that the insured did not furnish proof of loss as required by the policy. An affidavit made by the insured and furnished to the insurer, containing certain statements concerning the fire, set out in the opinion, and held to substantially comply with the provision of the policy requiring the insured to furnish the insurer proof of loss; (2) that the insurance company, by refusing to pay the loss and defending the action on the ground that the policy in suit was not in force at the date of the loss, thereby waived the furnishing

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to it of any proof of loss whatever. *Dwelling House Ins. Co. v. Brewster*, 43 Neb., 528, and cases there cited, followed.

2. ———: **TITLE TO PROPERTY: INSURABLE INTEREST.** A second defense of the insurer was that the insured at the date of the issuance of the policy was not the sole and unconditional owner of the insured real estate. *Held*, (1) That this issue was one of fact for determination by the jury, and the district court erred in not submitting it to them. (2) If, by a loss, the holder of an interest in property is deprived of the possession, enjoyment, or profit thereof, or a security or lien resting thereon, or other certain benefits growing out of or depending upon such property, he has an insurable interest therein. *German Ins. Co. v. Hyman*, 34 Neb., 704, followed. (3) It seems that where a policy is issued to one who holds the legal title to real estate, where no inquiries are made as to whether any other person is interested in such property, and no representations are made by the insured further than that he is the owner of the premises, that it is not a defense to the insurance company, in an action on such policy, that the insured, though holding the legal title to the premises, was a mere trustee for an undisclosed beneficiary.
3. ———: **VACANT PROPERTY: KNOWLEDGE OF COMPANY: ESTOPPEL.** The third defense of the insurance company was that the insured property, at the time of the issuing of the policy in suit, was vacant; and at the date of the fire had been vacant and unoccupied for ten days. The insured admitted the facts of the defense, but pleaded in avoidance thereof that the insurer issued the policy in suit with actual knowledge of the fact that the insured property was then vacant and unoccupied. *Held*, (1) that the provision in the policy rendering it void in case the insured property was at the date of the policy or should afterwards become vacant or unoccupied was inserted therein for the benefit of the insurer; (2) that the existence of the vacancy at the date of the issuance of the policy did not render the policy in suit void but voidable at the election of the insurer; (3) that as the insurer issued the policy in suit with actual knowledge of the fact that the insured premises were at the time vacant and unoccupied, it is now estopped from alleging such vacancy as a defense to an action on the policy; (4) that the knowledge of the agent of the insurance company that the property insured was vacant at the date of the issuance of the policy in suit was the knowledge of the company.

ERROR from the district court of Douglas county. Tried below before KEYSOR, J.

See opinion for statement of the case.

James H. Macomber, for plaintiffs in error:

The company made defense upon the merits of the case, contending and answering that the policy was void, whereby it cannot now be heard to allege and rely upon a want of proof of loss. (*Phenix Ins. Co. v. Bachelder*, 32 Neb., 490.)

Oral testimony is not admissible to show that the title was held in trust. (*Bicknell v. Lancaster City & County Fire Ins. Co.*, 58 N. Y., 677; *Ayers v. Hartford Fire Ins. Co.*, 17 Ia., 188; *German Ins. Co. v. Hyman*, 34 Neb., 704.)

The insurer had an insurable interest in the property. (*Phenix Ins. Co. v. Baudre*, 67 Miss., 620; May, Insurance, sec. 81; *Bicknell v. Lancaster City & County Fire Ins. Co.*, 58 N. Y., 677; *Phoenix Ins. Co. v. Mitchell*, 67 Ill., 43; *German Ins. Co. v. Hyman*, 34 Neb., 704; *Warren v. Davenport Fire Ins. Co.*, 31 Ia., 464; *McDonald v. Black*, 20 O., 185; *Hancox v. Fishing Ins. Co.*, 3 Sumner [U. S.], 132; *Western Horse & Cattle Ins. Co. v. Sheidle*, 18 Neb., 495; *Hoose v. Prescott Ins. Co.*, 84 Mich., 309; *Hall v. Niagara Fire Ins. Co.* 53 N. W. Rep. [Mich.], 728.)

The vacancy of the building for ten days just prior to the fire does not work a forfeiture of the policy. (*Springfield Ins. Co. v. McLimans*, 28 Neb., 850; *Billings v. German Ins. Co.*, 34 Neb., 502; *Menk v. Home Ins. Co.*, 76 Cal., 51; *Home Ins. Co. v. Gilman*, 112 Ind., 7; *Bonnert v. Pennsylvania Ins. Co.*, 129 Pa. St., 558; *Newman v. Covenant Mutual Ins. Association*, 76 Ia., 56; *Aurora Fire & Marine Ins. Co. v. Kranich*, 36 Mich., 289; *Bennett v. Agricultural Ins. Co.*, 106 N. Y., 243; *German Ins. Co. v. Rounds*, 35 Neb., 752; *England v. Westchester Fire Ins. Co.*, 51 N. W. Rep. [Wis.], 954; *Devine v. Home Ins. Co.*, 32 Wis., 471; *Dickinson v. State*, 20 Neb., 81; *Helme v.*

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Philadelphia Life Ins. Co., 100 Am. Dec. [Pa.], 621; *Hoffman v. Aetna Fire Ins. Co.*, 32 N. Y., 405.)

Jacob Fawcett, contra:

The policy was void because the insured was not the owner of the property. (*Henning v. Western Assurance Co.*, 42 N. W. Rep. [Ia.], 308; *Grigsby v. German Ins. Co.*, 40 Mo. App., 276; *Trott v. Woolwich Mutual Fire Ins. Co.*, 83 Me., 362; *Clark v. Dwelling House Ins. Co.*, 81 Me., 373; *Pelican Ins. Co. of New Orleans v. Smith*, 9 So. Rep. [Ala.], 327; *Barnard v. National Fire Ins. Co.*, 27 Mo. App., 26; *De Armand v. Home Ins. Co.*, 28 Fed. Rep., 603; *Crescent Ins. Co. v. Camp*, 64 Tex., 521; *Lasher v. St. Joseph Fire & Marine Ins. Co.*, 86 N. Y., 423; *Mers v. Franklin Ins. Co.*, 68 Mo., 127; *Hinman v. Hartford Fire Ins. Co.*, 36 Wis., 159; *Columbian Ins. Co. v. Lawrence*, 2 Pet. [U. S.], 25; *Day v. Charter Oak Fire & Marine Ins. Co.*, 51 Me., 99; *Denison v. Phoenix Ins. Co.*, 52 Ia., 457.)

Vacancy without the consent of the company indorsed upon the policy renders the same void. (*Royal Ins. Co. v. Lubelsky*, 86 Ala., 530; *Hotchkiss v. Home Ins. Co.*, 58 Wis., 297; *Ins. Co. of North America v. Garland*, 108 Ill., 220; *Newmarket Savings Bank v. Royal Ins. Co.*, 150 Mass., 374; *Evans v. Queen Ins. Co.*, 31 N. E. Rep. [Ind.], 843; *England v. Westchester Fire Ins. Co.*, 51 N. W. Rep. [Wis.], 954; *Boyd v. Vanderbilt Ins. Co.*, 16 S. W. Rep. [Tenn.], 470; *Herrman v. Adriatic Fire Ins. Co.*, 85 N. Y., 162; *Barry v. Prescott Ins. Co.*, 35 Hun [N. Y.], 601; *Hartshorne v. Agricultural Ins. Co.*, 50 N. J. Law, 427; *Bennett v. Agricultural Ins. Co.*, 50 Conn., 420; *Moore v. Phoenix Fire Ins. Co.*, 64 N. H., 140; *American Ins. Co. v. Padfield*, 78 Ill., 167; *Sexton v. Hawkeye Ins. Co.*, 69 Ia., 99; *Fishe v. Council Bluffs Ins. Co.*, 74 Ia., 676; *Cook v. Continental Ins. Co.*, 70 Mo., 610; *Farmers Ins. Co. v. Wells*, 42 O. St., 519; *Deweese v. Manhattan Ins. Co.*, 35 N. J. Law, 366.)

RAGAN, C.

This action was brought in the district court of Douglas county by L. G. Bangs against the Liberty Insurance Company of the city of New York (hereinafter called the "Insurance Company"). The action was based on an ordinary fire insurance policy issued by the Insurance Company to Bangs on certain real estate situate in the city of Omaha. The Rochester Loan & Banking Company (hereinafter called the "Loan Company") was joined as a party plaintiff because the policy provided that the loss, if any, should be payable to it as mortgagee. At the close of the evidence the jury, in obedience to a peremptory instruction of the district court, returned a verdict in favor of the Insurance Company, and to reverse the judgment of dismissal pronounced on such verdict Bangs and the Loan Company have prosecuted to this court a petition in error.

1. The policy in suit contained among other things the following provisions: That the policy should be void if the interest of the insured in the insured premises be other than unconditional and sole ownership; if the insured premises be or become vacant or unoccupied and so remain for ten days; that if a fire occurred the insured, within sixty days, should render a statement to the company, signed and sworn to by the insured, stating the knowledge and belief of the assured as to the time and origin of the fire, etc. One of the defenses interposed by the Insurance Company to the action was that the insured did not furnish it, the company, "proofs of loss as required by the terms and conditions of said policy of insurance." The fire occurred on the 7th day of November, 1891, and on the 1st day of December, 1891, Bangs made and furnished the Insurance Company an affidavit in words and figures as follows:

"STATE OF IOWA, }
CARROLL COUNTY. } ss.

"I, L. G. Bangs, being duly sworn, depose and say:

Rochester Loan & Banking Co. v. Liberty Ins. Co.

That my house on lot 3 of Allen's subdivision of lot 5, Ragan's Addition to Omaha, Nebraska, was destroyed by fire on the night of November 7, 1891; that the causes of the fire are unknown to me; that the damage done to my buildings was about \$1,000, and that said building was insured in the Liberty Insurance Company for \$900 by policy dated April 28, 1891; that I have made inquiry and am unable to find anything about the origin of the fire. The policy on said buildings was for \$800 on the house and \$100 on the barn.

L. G. BANGS.

"Subscribed and sworn to," etc.

We remark: (1.) This was a substantial compliance with the terms of the policy requiring Bangs to furnish the Insurance Company proofs of loss. (*Hanover Fire Ins. Co. v. Gustin*, 40 Neb., 828.) (2.) That if Bangs had wholly failed to furnish the Insurance Company any proofs of loss whatever, such failure under the circumstances of this case would afford the Insurance Company no defense whatever to this action. Here, as we shall presently see, the Insurance Company refuses to pay the loss, and defends against this action on the ground that the policy in suit was, at the date of the loss of the insured property, not in force. In *Phenix Ins. Co. v. Bachelder*, 32 Neb., 490, this court, speaking through its present chief justice, NORVAL, said: "The absolute denial by the insurer of all liability, on the ground that the policy was not in force at the time of the loss, is a waiver of the preliminary proofs of loss required by the policy." (See, also, *Western Home Ins. Co. v. Richardson*, 40 Neb., 1.) In *Omaha Fire Ins. Co. v. Dierks*, 43 Neb., 473, it was held: "The right of an insurance company to notice of loss is a right which the company may waive; and when the insurer denies all liability for the loss, and refuses to pay the same, and places such denial and refusal upon grounds other than the failure of the insured to give notice of the loss, such denial and refusal avoid the necessity of such notice." (See, also,

Omaha Fire Ins. Co. v. Dierks, 43 Neb., 473.) The precise question was squarely presented and decided in *Dwelling House Ins. Co. v. Brewster*, 43 Neb., 528, where HARRISON, J., speaking for this court to the point, said: "Proofs of loss required by a condition of an insurance policy are waived when the insurance company denies any liability for the loss on the ground that the policy was not in force at the date of the loss." We conclude, therefore, that the Insurance Company waived the defense under consideration, in view of the fact that it defended the action on the ground that the policy was not in force at the date of the loss; and if the Insurance Company had not waived such defense, that the evidence establishes that the insured sufficiently complied with the provisions of the policy in reference to furnishing the Insurance Company proofs of loss.

2. The second defense of the Insurance Company was that Bangs, at the time of the issuance of the policy in suit, was not the unconditional and sole owner of the real estate insured; that such real estate was in fact the property of the Loan Company, the title to which property was held in trust for it by Bangs. The policy in suit was issued on the 28th of April, 1891. It is undisputed that prior to the 21st of April, 1891, the Loan Company was the owner and held the legal title to the insured real estate. On the 21st day of April, 1891, the Loan Company, at its home office in the state of New Hampshire, executed to Bangs an absolute warranty deed for this property, which was recorded in the office of the register of deeds some time in the following May. On the trial of this action Bangs swore that he was the owner of this real estate and had been since the date of his deed, and that he purchased it of the Loan Company at private sale. The president of the Loan Company testified on the trial that Bangs was the owner of the property. We are unable to understand upon what theory the learned district judge reached the conclusion, if he did reach such conclusion, that this evidence

was insufficient to establish that Bangs was the unconditional owner of the insured property. The president of the Loan Company and Bangs, at the time of the issuance of the policy in suit, resided in Carroll, Iowa; and Bangs admitted in his testimony that he had never seen this property, and that he did not furnish the money which paid the insurance premium. The evidence of the president of the Loan Company was that he or the Loan Company took out the insurance on the property in the name of Bangs, and that he or the Loan Company paid the premium; that he had corresponded with certain real estate agents in the city of Omaha for the purposes of having them effect a sale of this property and to procure a tenant for the property and collect rents. But when it is remembered that the Loan Company had a mortgage upon this real estate, then its conduct in the premises was entirely consistent with Bang's ownership of the property. Nor are we able to understand how Bangs could be deprived of the title to his property because a person holding a mortgage on it should insure it in Bangs' name for the mortgagee's benefit. In any event this evidence, and the effect of it, was not for the learned district court but for the jury, and had the court permitted this case to go to the jury, and it had returned a special finding that Bangs, at the time the policy in suit was issued, was not the unconditional owner of the real estate, the evidence in this record would not support such a finding.

Considerable stress is placed by counsel for the Insurance Company upon the fact that it does not appear from the evidence what, if any, consideration Bangs paid the Loan Company for this property, but we do not think that is a matter which concerns the Insurance Company. The Loan Company may have given its property to Bangs, and if so, he would nevertheless be the owner of it. Indeed, it would seem that had the Loan Company conveyed the title to this property to Bangs without consideration and for the fraudulent purpose of placing it beyond the reach of the

Loan Company's creditors, that that would not afford any defense to the Insurance Company. *German Ins. Co. v. Hyman*, 34 Neb., 704, was an action on an insurance policy issued on a stock of millinery to Mrs. Hyman. The insurance company defended on the ground that Mrs. Hyman was not the owner of the goods insured and destroyed; that they had been purchased with the money and proceeds of property given her by her husband for the purpose of defrauding his creditors. Post, J., in discussing and overruling this defense, said: "Suppose plaintiff in error were a trespasser instead of an insurer and was called upon to answer for a conversion of the property. Would it be heard in defense to say that the title of the insured had been acquired in fraud of the rights of a third party? Certainly not. Nor is there any rule of law or morals which will sanction such a defense in this action. It is said that had the plaintiff in error known of the business record of Louis Hyman, that is, the fact that he had once made an assignment, it would have refused to insure the property. It is a sufficient answer to this claim that there is no rule of law which imposes upon the owner of property the duty to volunteer such information to an insurance company. An interest, to be insurable, does not depend necessarily upon the ownership of the property. It may be a special or limited ownership disconnected from any title, lien, or possession. If the holder of an interest in the property will suffer loss by its destruction he may indemnify himself therefrom by a contract of insurance. If, by the loss, the holder of the interest is deprived of the possession, enjoyment, or profit of the property, or a security or lien resting thereon, or other certain benefits growing out of or depending upon it, he has an insurable interest." From this it seems that possession with claim of ownership of personal property invests one with an insurable interest therein; and that if an insurance company insures such property, and a loss occurs, it cannot defend against the payment of such loss on

the ground that the insured party held the property in trust for some other person, even to enable such third person to consummate a fraud, where it effected such insurance without inquiry as to the insured's actual title, and without the express and positive false representations of the insured as to his actual title believed in and acted upon by the insurance company. And it seems that where a policy is issued to one who holds the legal title to real estate, where no inquiries are made as to whether any other person is interested in such property, and no representations are made by the insured further than that he is the owner of the property, that it is not a defense to the insurance company, in an action on such policy, that the insured, though holding a legal title to the premises, was a mere trustee for an undisclosed beneficiary. If any other person than Bangs has any interest or ownership in this real estate, or any part of it, it does not appear from the evidence before us, further than the lien thereon by the Loan Company by virtue of its mortgage. We are not called upon to decide, nor do we decide, whether the provision in the policy requiring the insured to be the unconditional and sole owner of the insured property is complied with when such property is real estate and the insured has the legal title thereto, even if it should develop that he held such title in trust for the use of some other person. That question is not before us.

3. The third defense of the Insurance Company was that the insured property, at the time of the issuance of the policy, was vacant and at the date of the fire had been vacant and unoccupied for ten days. The reply of the insured admits that the property was vacant as stated, but pleads in avoidance of this defense a waiver or estoppel thereof by the company. The provision in an insurance policy rendering it void because the insured property is, at the time of its insurance, or shall afterwards become, vacant and unoccupied for a certain time, is inserted therein

for the benefit of the insurer; it is a provision which the insurer may waive; and the existence of the vacancy at the date of the insurance or the happening of the vacancy afterwards does not render the policy void but voidable at the election of the insurer. On the 20th day of April, 1891, the president of the Loan Company at Carroll, Iowa, addressed the letter to the agents of the Insurance Company in Omaha, Nebraska, in which he made this inquiry: "Please let me know what rate you will give me for three years' risk on the following properties: One thousand dollars on a one and one-half story frame dwelling house, with addition, on lot 3, Allen's subdivision of lot 5, Ragan's Addition to Omaha?" This is the property covered by the insurance policy in suit. On the 25th of April, 1891, the agents of the Insurance Company answered this letter, acknowledging its receipt, stating that the rate for one year was fifty cents, for three years one per cent, for five years one and one-half per cent, and then said: "The one and one-half story on lot 3, Allen's subdivision of lot 5, Ragan's Addition, we would not wish to carry more than \$800 on this dwelling. The last described dwelling is vacant, but the barn is occupied." On the 27th of April the president of the Loan Company wrote to the agents of the Insurance Company as follows: "Please send me policy on the one and one-half story dwelling on the insured property, \$800 on the dwelling and \$100 on the barn. Make the policy in the name of L. G. Bangs, present owner, with mortgage clause loss, if any, payable to the Rochester Loan & Banking Company. Send policy to me and I will return draft for premium." In pursuance of this correspondence the agents of the Insurance Company issued the policy in suit and on the 29th of April, 1891, enclosed it in a letter to the president of the Loan Company at Carroll, Iowa. On the 30th of the same month the president of the Loan Company transmitted to the agents of the Insurance Company the premium on the policy.

It would seem almost unnecessary to cite authorities to show that since the insured property was vacant and unoccupied at the date of the issuance of the policy in suit, which fact was actually known by the Insurance Company, and with that knowledge actually before it, it chose to insure the property, that in doing so it elected to and did waive the conditions in the policy that the same should be void if the property was at the time it was insured vacant. The knowledge of the agents of the Insurance Company that the property was vacant at the date of the issuance of the policy was the knowledge of the company. Notice to an insurance agent who issues a policy, of facts relating to the subject-matter of the insurance, is notice to the company, and if he fails to properly state them in the policy when relied upon and trusted to do so, the company should not be permitted to escape liability on that ground. (*Commercial Ins. Co. v. Spankneble*, 52 Ill., 53.) In *Williams v. Niagara Fire Ins. Co.*, 50 Ia., 561, it was held: "Notwithstanding the policy provided that if the premises became unoccupied during the life of the policy, without the written consent of the company indorsed thereon, the policy should be void, it was held that where an agent insured an unoccupied building, and received the premium therefor, the company was estopped from denying that the policy had a legal existence." And in *Aurora Fire & Marine Ins. Co. v. Kranich*, 36 Mich., 289, it was held: "The provision in a policy that 'if at any time during the continuance of this policy * * * the insured property * * * shall become vacant or unoccupied' the insurer shall be absolved from all liability, is held to have no application to the case of buildings that are vacant at the time the policy is issued, the insurer having notice of the fact." To the same effect see *Short v. Home Ins. Co.*, 90 N. Y., 16; *Bennett v. Agricultural Ins. Co.*, 12 N. E. Rep. [N. Y.], 609.

The evidence in the record then does not sustain the de-

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fense of the Insurance Company that the policy in suit was not in force at the date of the loss because of the fact that the insured property was and had been vacant for ten days at the time of its destruction and was vacant at the time the policy was issued; but the evidence does sustain the plea of confession and avoidance interposed to this defense by the insured that the company, by its conduct in insuring the property, knowing that it was vacant at the time, had estopped itself from interposing this defense. It must be borne in mind that the condition of the property, so far as occupancy is concerned, was the same at the time it was destroyed as at the date of its insurance. The judgment of the district court is reversed and the cause remanded.

REVERSED AND REMANDED.

INSURANCE COMPANY OF NORTH AMERICA V. HENRY
BACHLER.

FILED APRIL 4, 1895. No. 6124.

1. **Insurance: EFFECT OF INCUMBRANCE.** An insurance contract provided that the policy should be void if the insured should fail to make known every fact material to the risk, including the amount of incumbrance, if any, on the insured property, whether interrogated with reference thereto or not. In a suit on such policy the insurer interposed the defense that the policy sued on never took effect, because at the date of its issuance there was an outstanding mortgage against the real estate of which the insurer had no knowledge. The application for the insurance was oral. No inquiries were made by the agent of the insurer as to the condition of the title to the property. The insured said nothing about the existence of the mortgage, but he kept silent because he did not know that it was his duty to disclose its existence. He did not keep silent from any sinister motive or with the intention on his part to deceive or mislead the insurer. *Held*, (1) That the existence of the mortgage on the insured prop-

44	549
48	750

44	549
49	273
49	817
53	213
53	814
53	821
55	151

44	549
56	490

44	549
59	256

44	549
60	123

44	549
62	222

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erty was a fact material to the risk ; (2) that the insured's acceptance of the policy under the circumstances was not a representation that the insured property was free from incumbrance; (3) that the silence of the insured under the circumstances was not a misrepresentation as to the condition of his title.

2. ———: **EXISTENCE OF MORTGAGE: VALIDITY OF POLICY.** Where the insured was not questioned as to incumbrances on his property, and did not intentionally conceal the facts, the existence of a mortgage thereon does not invalidate the policy. Following *Vankirk v. Citizens Ins. Co.*, 48 N. W. Rep. [Wis.], 798.
3. **Review: ADMISSION OF IRRELEVANT EVIDENCE: FAILURE TO OBJECT.** Assignments of error that a verdict rendered is not supported by sufficient evidence, and the judgment pronounced thereon is contrary to the law of the case, cannot be sustained because certain evidence admitted without objection on the trial was irrelevant under the pleadings. *Omaha Fire Ins. Co. v. Dierks*, 43 Neb., 473, followed.
4. **Insurance: BUILDINGS.** Insurance upon a building is insurance upon a building as such and not upon the materials of which it is composed. *German Ins. Co. v. Eddy*, 36 Neb., 461, followed.
5. ———: **TOTAL LOSS.** To sustain the finding of a jury that a building destroyed by fire was a total loss within the meaning of the statute it is not necessary that the evidence should show that the material of which such building was composed was by the fire transformed into cinders, smoke, and ashes.
6. **Contracts to Arbitrate: DEFENSE TO ACTION.** If parties to a contract agree if a dispute arise between them that such dispute shall be submitted to arbitrators, refusal to arbitrate or no arbitration is not a defense to an action brought on such contract by one of the parties thereto. *National Masonic Accident Association v. Burr*, 44 Neb., 256, and cases there cited followed.
7. **Costs: TAXATION: REVIEW.** In order to review the question of retaxation of costs a motion to retax the costs must be made to the trial court and a ruling had thereon by that court. *Real v. Honey*, 39 Neb., 516, followed.
8. **Valued Policy Act: COSTS: ATTORNEYS' FEES: CONSTITUTIONAL LAW.** Section 45, chapter 43, Compiled Statutes, 1893, construed, and *held*, (1) that the courts of the state, by virtue of said section, have the power, upon rendering judgment against an insurance company on a policy of insurance on real property, to allow the plaintiff in the action a reasonable sum as an attorney's fee, to be taxed as part of the costs in the case (*Han-*

over *Fire Ins. Co. v. Gustin*, 40 Neb., 828, followed); (2) that the subject-matter of said section is not embraced within the prohibitions of section 15, article 3, of the constitution, (3) and is not, therefore, prohibited as special legislation; (4) that as said section is general and uniform throughout the state and operates alike upon all persons and localities of a class, it is not obnoxious to the constitution as being class legislation.

9. **Insurance: VALUED POLICY ACT: CONTRACTS TO LIMIT LIABILITY.** Where real property is wholly destroyed by fire, any provision of a policy of insurance covering such property which in any manner attempts to limit the amount of the loss to less than the sum written in the policy is in conflict with the statutory rule, invalid, and will not be enforced. *Home Fire Ins. Co. v. Bean*, 42 Neb., 537, followed and reaffirmed.

ERROR from the district court of Otoe county. Tried below before CHAPMAN, J.

The opinion contains a statement of the case.

Jacob Fawcett, for plaintiff in error:

The action must fail, because there was a mortgage upon the insured premises at the time of the fire, the existence of which had not been disclosed to the company. (*Waller v. Northern Assurance Co.*, 10 Fed. Rep., 232; *Bowman v. Franklin Fire Ins. Co.*, 3 Ins. L. J. [Md.], 935; *Hinman v. Hartford Fire Ins. Co.*, 36 Wis., 159.)

The right of an insurance company to insist upon an appraisal as a condition precedent to the commencement of a suit, where the policy contains such a provision, is now the settled law of the land. (*Redell v. Kennedy*, 16 N. E. Rep. [N. Y.], 326; *Knoche v. Chicago, M. & St. P. R. Co.*, 34 Fed. Rep., 471; *Doyle v. Patterson*, 6 S. E. Rep. [Va.], 138; *Herrick v. Belknap*, 27 Vt., 673; *Delaware & Hudson Canal Co. v. Pennsylvania Coal Co.*, 50 N. Y., 250; *Holmes v. Ritchet*, 56 Cal., 307; *Faunce v. Burke*, 16 Pa. St., 480; *Reynolds v. Caldwell*, 51 Pa. St., 298; *Flaherty v. Germania Ins. Co.*, 7 Ins. L. J. [Pa.], 226; May, Insurance, sec. 493; *Reed v. Washington Fire & Marine Ins.*

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Co., 14 Ins. L. J. [Mass.], 465; *Scott v. Avery*, 5 H. L. Cas. [Eng.], 811; Myers, Federal Decisions, p. 1036, sec. 72; Wood, Insurance, p. 757; *Scottish Union & Nat. Ins. Co. v. Clancy*, 8 S. W. Rep. [Tex.], 630; *German-American Ins. Co. v. Steiger*, 109 Ill., 254; *United States v. Robeson*, 9 Pet. [U. S.], 319; *Lovejoy v. Hartford Fire Ins. Co.*, 11 Ins. L. J. [Ill.], 186; *Gasser v. Sun Fire Office*, 19 Ins. L. J. [Minn.], 243; *Sullivan v. Sussong*, 9 S. E. Rep. [S. Car.], 156; *Johnson v. American Fire Ins. Co.*, 43 N. W. Rep. [Minn.], 59; *Chippewa Lumber Co. v. Phenix Ins. Co.*, 44 N. W. Rep. [Mich.], 1055; *Pioneer Mfg. Co. v. Phoenix Assurance Co.*, 10 S. E. Rep. [N. Car.], 1057; *Hamilton v. Liverpool Ins. Co.*, 136 U. S., 254; *Mossness v. German-American Ins. Co.*, 52 N. W. Rep. [Minn.], 932.)

E. F. Warren, also for plaintiff in error.

John C. Watson, contra:

If an insurance company elects to issue a policy without an application, or any representations concerning title, it cannot, after loss, complain that insured's interest was not correctly stated in the policy, or that an existing incumbrance was not disclosed. (*Western Assurance Co. v. Mason*, 5 Bradw. [Ill.], 141; *Hartford Fire Ins. Co. v. Haas*, 8 Ky., 610; *Washington Mills Emery Mfg. Co. v. Weymouth & Braintree Mutual Fire Ins. Co.*, 135 Mass., 503; *Castner v. Farmers Mutual Fire Ins. Co.*, 46 Mich., 15; *Traders Ins. Co. v. Barraccliffe*, 45 N. J. Law, 543; *Agricultural Ins. Co. v. Yates*, 10 Ky., 984; *O'Brien v. Ohio Ins. Co.*, 52 Mich., 131; *Rawls v. American Life Ins. Co.*, 36 Barb. [N. Y.], 357; *Pennsylvania Mutual Life Ins. Co. v. Wiley*, 100 Ind., 92; *Dilleber v. Home Life Ins. Co.*, 69 N. Y., 256; *Higgins v. Phoenix Mutual Life Ins. Co.*, 74 N. Y., 9.)

Valued policy laws are held to be valid and enforceable, because based upon grounds of public policy and intended

to do away with great evils, mischiefs, and abuses that were subverting business morality and injuring business interests, and being founded upon such considerations, like all other private contracts, their provisions or terms cannot be waived, either by express stipulation or doubtful implication. (*Rielly v. Franklin Ins. Co.*, 43 Wis., 449; *Williams v. Hartford Ins. Co.*, 54 Cal., 442; Chitty, Contracts, 598; *Staines v. Wainright*, 6 Bing. N. C. [Eng.], 174; *Phalen v. Clark*, 19 Conn., 421; *Nellis v. Clark*, 4 Hill [N. Y.], 424; *Dodson v. Harris*, 10 Ala., 566; *Martin v. Wade*, 37 Cal., 168; *Hoover v. Pierce*, 27 Miss., 13; *Thompson v. Citizens Ins. Co.*, 45 Wis., 388.)

“Wholly destroyed” does not mean an absolute extinction by fire of the property. (*Williams v. Hartford Fire Ins. Co.*, 54 Cal., 442.)

The term “total loss” is a native of marine insurance, and the precedents for the construction of the valued policy laws were at least given color by this doctrine of total loss as founded in that branch of law. Here, it must be observed, as a very important factor, that a total loss may be either actual or constructive. (*Idle v. Royal Exchange Assurance Co.*, 8 Taunt. [Eng.], 755; *Cambridge v. Anderton*, 1 C. & P. [Eng.], 60; *Dyson v. Rowcroft*, 3 Bos. & P. [Eng.], 474; *Gordon v. Massachusetts Fire & Marine Ins. Co.*, 2 Pick. [Mass.], 249.)

When the loss is not absolutely total in the ordinary sense of the term, but occurred in such a manner that the insured is deemed to be justified in abandoning all efforts to save what remains, under the marine insurance law, upon a formal notice of abandonment of his interest to the underwriter, he is entitled to claim a total loss. (*Peele v. Merchants Ins. Co.*, 3 Mason [U. S.], 27; *Bradlie v. Maryland Ins. Co.*, 12 Pet. [U. S.], 397; *Coeplin v. Phoenix Ins. Co.*, 46 Mo., 211; *Ruckman v. Merchants Louisville Ins. Co.*, 5 Duer [N. Y.], 342; *The Brig Sarah Ann*, 2 Sum. [U. S.], 206; *Fulton Ins. Co. v. Goodman*,

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32 Ala., 108; *German Ins. Co. v. Eddy*, 36 Neb., 461; *German Ins. Co. v. Penrod*, 35 Neb., 273.)

Insurance companies cannot nullify the effects of the valued policy law by inserting in their policy arbitration clauses. (*Hall v. People's Mutual Fire Ins. Co.*, 6 Gray [Mass.], 185; *Bartlett v. Union Mutual Fire Ins. Co.*, 46 Me., 500; *Reichard v. Manhattan Life Ins. Co.*, 31 Mo., 518; *Amesbury v. Bowditch Mutual Fire Ins. Co.*, 6 Gray [Mass.], 596; *Nute v. Hamilton Mutual Ins. Co.*, 6 Gray [Mass.], 174; *Indiana Mutual Fire Ins. Co. v. Routledge*, 7 Ind., 25.)

A provision of the policy which conflicts with the statutes of the state where the company is doing business is null and void. In such cases the statute enters into and becomes a part of the contract and controls any conflicting provisions in the policy. (*Fletcher v. New York Life Ins. Co.*, 13 Fed. Rep., 526; *Wall v. Equitable Life Assurance Society*, 32 Fed. Rep., 273; *Vore v. Hawkeye Ins. Co.*, 41 N. W. Rep. [Ia.], 309; *Reiner v. Dwelling House Ins. Co.*, 42 N. W. Rep. [Wis.], 208; *Sly v. Ottawa Agricultural Ins. Co.*, 29 U. C. C. P., 28; *Goring v. London Mutual Fire Ins. Co.*, 11 Ont. [Can.], 82; *Frey v. Mutual Fire Ins. Co.*, 43 U. C. Q. B., 102; *Sauvey v. Isolated Risk & Farmers Fire Ins. Co.*, 44 U. C. Q. B., 523.)

If the policy does not clearly indicate that arbitration and award are conditions precedent to any action on the policy, then it is bad, and an action may be brought at once. (*Birmingham Fire Ins. Co. v. Pulver*, 18 N. E. Rep. [Ill.], 804; *Gere v. Council Bluffs Ins. Co.*, 67 Ia., 272; *Reed v. Washington Fire & Marine Ins. Co.*, 138 Mass., 572; *Williams v. Hartford Ins. Co.*, 54 Cal., 442; *German-American Ins. Co. v. Steiger*, 109 Ill., 254; *Mark v. National Fire Ins. Co.*, 24 Hun [N. Y.], 565; *Liverpool, London & Globe Ins. Co. v. Creighton*, 51 Ga., 95; *Schollenberger v. Phoenix Ins. Co.*, 7 Ins. L. J. [Pa.], 697.)

If an arbitration clause seeks to oust the courts of juris-

diction by making the award of the arbitrators final, it is not binding on the assured. (*Case v. Manufacturers Fire & Marine Ins. Co.*, 21 Pac. Rep. [Cal.], 843; *German-American Ins. Co. v. Etherton*, 25 Neb., 505; *Crossley v. Connecticut Fire Ins. Co.*, 27 Fed. Rep., 30; *Lasher v. Northwestern National Ins. Co.*, 18 Hun [N. Y.], 98; *Mentz v. American Fire Ins. Co.*, 79 Pa. St., 478; *Trott v. City Ins. Co.*, 1 Cliff. [U. S.], 439; *Cobb v. New England Mutual Marine Ins. Co.*, 6 Gray [Mass.], 192; *Stephenson v. Piscataqua Fire & Marine Ins. Co.*, 54 Me., 55; *Allegre v. Maryland Ins. Co.*, 2 G. & J. [Md.], 136.)

In case of total loss arbitration cannot be made a condition precedent to action by the assured. (*Rosenwald v. Phenix Ins. Co.*, 3 N. Y. Supp., 215.)

In those states having a valued policy law the condition for arbitration is not binding on the assured in case of total loss. (*Thompson v. St. Louis Ins. Co.*, 43 Wis., 459; *Thompson v. Citizens Ins. Co.*, 45 Wis., 388.)

RAGAN, C.

To reverse a judgment pronounced against it by the district court of Otoe county in favor of Henry Bachler in a suit based on an ordinary fire insurance policy the Insurance Company of North America (hereinafter called the "Insurance Company") has prosecuted to this court proceedings in error.

1. The first assignment of error is that the district court erred in giving instructions numbered 1 to 10, both inclusive, upon its own motion; and the second assignment is that the court erred in refusing to give the instructions 1 to 11, both inclusive, requested by the plaintiff in error. The court did not err in giving all these instructions, nor err in refusing to give all the instructions asked for, and for that reason these assignments must be overruled.

2. No specific ruling of the district court in the admission or rejection of evidence is assigned as error in the pe-

tition in error filed here. Our examination of the record then is confined to the determination of whether the verdict pronounced by the jury is supported by sufficient competent evidence, and whether the judgment pronounced by the court is contrary to the law of the case.

3. The policy sued on was issued on the 1st day of October, 1889, and insured the property of Bachler from loss or damage by fire for one year. October 1, 1890, a renewal certificate was issued by the Insurance Company continuing the policy in force for another year, and on October 1, 1891, another renewal certificate was issued continuing the policy in force until October 1, 1892. On the 22d day of February, 1892, the insured property was destroyed by fire. At the time the policy was originally issued and at the time the policy was renewed on the 1st of October, 1891, there existed an unrecorded mortgage against the insured property. This mortgage was recorded in June, 1891, and was in existence and a lien upon the insured property at the time the policy was renewed October 1, 1891. The policy, among other provisions, contained the following: "The acquiring by a third party of an insurable interest in the property or any part thereof by virtue of a mortgage or a deed of trust executed by the assured subsequent to the date hereof * * * shall cause an immediate termination of this policy," etc. The argument here is that because of the existence of this mortgage on the insured property October 1, 1889, that the policy sued upon never took effect and never was in force, and as the mortgage still existed upon the property on the 1st of October, 1890, that the renewal certificate issued on that date continuing the policy in force for one year was without effect for that purpose. This is a violent construction of the contract. Its language is in effect that if the insured shall subsequent to the date of the issuance of the insurance policy mortgage the insured property, etc., that the execution of such mortgage shall terminate the policy.

The insured did not incumber this property by mortgage subsequent to the date of the renewal of the policy made the subject of this suit, namely, October 1, 1890, nor did he incumber this property subsequent to the time that the original contract of insurance was issued, to-wit, October 1, 1889. The fact that there existed a mortgage upon the property insured at the date of the issuance of the insurance contract did not itself prevent the policy from taking effect. The evidence shows, without conflict, that neither the original issuance of this policy nor either of its renewals were based on any written application made by the insured to the Insurance Company for the insurance; that the agent of the company at neither of said times made inquiries of the insured as to whether the property proposed to be insured was incumbered by a mortgage; that the agent of the Insurance Company at neither of said times knew of the existence of the mortgage upon the insured property; and that the insured at neither of said times informed the agent of the Insurance Company that the property was incumbered by a mortgage. But the evidence also warrants the conclusion that the insured was not actuated by any sinister motive in not disclosing to the agent of the Insurance Company the existence of this mortgage; that as he was not interrogated upon the subject he remained silent because he was ignorant of the fact that he was under any obligation to disclose the existence of the mortgage. The policy contained a provision that if the insured should "fail to make known every fact material to the risk, including the amount of incumbrance, if any, on said property, whether interrogated with reference thereto or not, this policy shall be void." It is now argued that the judgment under consideration here is contrary to the law of the case, because of the failure of the insured to inform the Insurance Company of the existence of this mortgage upon the insured property at the time the policy was originally issued, October 1, 1889, or at least at the date

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when the renewal certificate was issued, October 1, 1891. In support of this contention counsel cite us to *Waller v. Northern Assurance Company*, 10 Fed. Rep., 232. The provision in the policy made the subject of that action was practically the same as the provision in the policy here, and it appeared from the evidence that the only interest the assured had in the property was that of a mortgagee. It also appeared that at the time the insured applied for the insurance no inquiries were made by the insurance company's agent as to the title the insured had in the property, and the insured made no representations as to the character of his estate in the property which he desired insured, and the court held, McCrary, C. J., delivering the opinion, that it was the duty of the insured, when he applied for the insurance, to disclose the nature of his interest in the insured property, whether or not any inquiry was made of him on the subject. The case cited then appears to sustain the contention of counsel.

Another case cited by counsel is *Becker v. Hibernian Ins. Co.*, 44 Ind., 95. We have been unable to find this case. Certainly there is no such case in the 44th Indiana.

Another case cited in support of this contention is *Hinman v. Hartford Fire Ins. Co.*, 36 Wis., 159. In that case the insured made and signed an application in writing to the insurance company for the insurance, in which application were the following questions and answers: "Q. Is the property mortgaged? A. No. Q. Are you the sole and undisputed owner of the property to be insured? A. Yes. Q. Do you own the ground on which the building stands? A. By contract." The policy contained a provision that if the assured in his application had made any erroneous representation, or had omitted to make known any fact material to the risk, or if the insured was not the sole and unconditional owner of the property insured, or of the land on which the building stood, that the policy should be void. The undisputed evidence at the

trial showed that at the time the policy was issued that the insured had no title whatever to the real estate, but was in possession thereof under a contract of purchase. The court held that the answers of the insured, taken together, were equivalent to a statement that although he held the land and building under a contract of purchase, yet no person other than himself had any substantial interest in them; that he had fully paid for the land and was the equitable owner, with the right to enforce a conveyance to himself of the legal title; that such representation was material and false, and rendered the policy void. It will thus be seen that the decision in the case last cited is not applicable to the facts of the case under consideration. Counsel also cite us to *Pennsylvania Ins. Co. v. Gottsman*, 48 Pa. St., 151, and *Brown v. Commonwealth Ins. Co.*, 41 Pa. St., 187. We have not examined these authorities, but assumed for the purposes of this case that they support the contention of counsel.

The rule laid down in the case in 10 Fed. Rep., *supra*, is far away from the weight of authority on the question under consideration. The true rule, we think, and the one supported by the decided weight of authority, was announced by the supreme court of Wisconsin in *Vankirk v. Citizens Ins. Co. of Pittsburgh*, 48 N. W. Rep. [Wis.], 798, in the following language: "Where the assured was not questioned as to incumbrances on his property, and did not intentionally conceal the facts, the existence of a mortgage thereon does not invalidate the policy." To the same effect see *Alkan v. New Hampshire Ins. Co.*, 10 N. W. Rep. [Wis.], 91. This is also the rule in Michigan. (See *Castner v. Farmers Mutual Ins. Co.*, 8 N. W. Rep. [Mich.], 554.) *O'Brien v. Ohio Ins. Co.*, 17 N. W. Rep. [Mich.], 726, where it was held: "Where insurance is applied for orally, and the applicant is unaware of any provision in the policy regarding incumbrances, and is not guilty of any misleading conduct, his bare silence cannot be deemed a

misrepresentation; and if the agent in such a case did not read the policy to the applicant or call his attention to the clause relating to incumbrances, the existence of a mortgage would be no impediment to a recovery from the insurance company." See, also, *Guest v. New Hampshire Fire Ins. Co.*, 33 N.W. Rep. [Mich.], 31, where it was held: "A mere failure of the assured to mention incumbrances on the insured property, if not inquired about, where the application for insurance is oral, and no deceit is practiced, will not vitiate the policy." It is also the rule in Massachusetts. (See *Washington Mills Emery Mfg. Co. v. Weymouth & Braintree Mutual Fire Ins. Co.*, 135 Mass., 503.) It is also the rule in New Jersey. (See *Trade Ins. Co. v. Barraccliffe*, 45 N. J. Law, 543.) In Wood, Insurance, it is stated that when no inquiries are made the intention of the assured becomes material, and to avoid the policy it must be found not only that the matter was material, but also that it was intentionally and fraudulently concealed.

We conclude, therefore, that Bachler's failure to inform the agent of the Insurance Company of the existence of the mortgage upon the insured property either at the date that the policy was issued or renewed did not vitiate the policy or prevent its going into effect. It is not doubted that the existence of the mortgage on the property was a fact material to the risk. But the application for this insurance was oral. No inquiries were made by the agent of the Insurance Company as to the condition of the title to the property; and Bachler said nothing about the existence of the mortgage for the reason that he did not know that it was his duty to disclose the existence of the mortgage. It is not pretended that Bachler kept silent from any sinister motive or with any intention on his part to deceive or mislead the Insurance Company. In other words, Bachler's acceptance of the policy was not under the circumstances a representation that the insured property was free from the mortgage; nor was his silence under the circumstances a misrepresentation as to the condition of his title.

4. Another argument under this head is this: The Insurance Company, in its answer, set up as a defense to the suit the existence of this mortgage on the insured property at the date that the policy was originally issued and at the dates of its renewal. The reply to this defense was a general denial. The undisputed evidence is, as already seen, that the mortgage was on the property when the policy was originally issued and at each of the times when it was renewed, and the contention is that, therefore, the judgment pronounced is contrary to the law and evidence of the case; but this is in effect saying that the district court erred in permitting the insured to prove the circumstances under which the policy was issued and renewed, that the application for the insurance was oral, that the Insurance Company had no knowledge of the existence of the mortgage, made no inquiries respecting it, and the insured on his part did not know that it was his duty to communicate the existence of the mortgage to the insurance agent and made no disclosure of the existence of the mortgage for that reason. This precise question arose and was decided in *Omaha Fire Ins. Co. v. Dierks*, 43 Neb., 475, and it was there held that if such evidence was irrelevant under the pleadings, counsel for insurance company should have objected to the ruling of the district court on that ground, and then specifically assigned the ruling of the district court in admitting such evidence in his petition in error.

5. The next argument is that the verdict that the insured property was wholly destroyed by fire is not supported by sufficient evidence. This was purely a question of fact for the jury, and while there is some conflict in the evidence, we cannot say that the verdict lacks sufficient evidence to support it. The insured building was a frame structure, the rear wall of which was veneered with brick. The evidence does not show that the material of which the building was composed was transformed by the fire into cinders, smoke, and ashes; nor is it necessary that the evidence

should so show, in order to support the jury's finding, that the loss was total. We conclude from the evidence in the record, included in which evidence is a photograph of the premises immediately after the fire, that the insured premises was reduced to a wreck by the fire; that what remained of the building was practically valueless. There were some boards and some bricks and some pieces of material and parts of the floors and walls that were not consumed, but after the fire the building insured did not exist as a building. An insurance upon a building is an insurance upon a building as such, and not upon the materials of which it is composed. (*Williams v. Hartford Ins. Co.*, 54 Cal., 442; *German Ins. Co. v. Eddy*, 36 Neb., 461.)

6. The policy in suit contained this provision: "If differences shall arise between the parties hereto as to the amount of any loss or damage, * * * the matter shall, at the written request of either party, be submitted to three impartial arbitrators, each party to choose one, and the two so chosen to choose the third, whose award, in writing, signed by a majority of the arbitrators, shall be binding on the parties as to the amount of such loss or damage, but shall not decide the legal liability of the company under this policy. And in such case of disagreement, the determination of the amount of the loss or damage sustained by arbitrators as aforesaid shall be a condition precedent to the right of the assured, or either party, to institute proceedings at law for the recovery of the claim hereunder." One of the defenses interposed by the Insurance Company to this action was that a disagreement arose between it and Bachler as to the amount of the loss or damage he had sustained by reason of the fire; that the Insurance Company, in pursuance of the provision of the policy just quoted, requested, in writing, of Bachler that the amount of such loss or damage might be arbitrated, and that Bachler had refused to submit the amount of loss or damage he had sustained by the fire to arbitration. Assuming that the evi-

dence in the record sustains without conflict the contention of the Insurance Company that it demanded that the amount of the loss or damage sustained by Bachler on account of the fire should be submitted to arbitration and that he had refused to arbitrate it, the defense must fail. This precise question was decided adversely to the contention of the plaintiff in error in *German-American Ins. Co. v. Etherton*, 25 Neb., 505, and again decided in *German Ins. Co. v. Eddy*, 36 Neb., 461. The question was again considered in *Home Fire Ins. Co. v. Bean*, 42 Neb., 537. The court, speaking through HARRISON, J., said: "A provision in a policy that no suit or action against the insurer 'shall be sustained in any court of law or chancery until after an award shall have been obtained' by arbitration, fixing the amount due after loss, is void, the effect of such provision being to oust the courts of their legitimate jurisdiction." This question was again considered in *National Masonic Accident Association v. Burr*, 44 Neb., 256, and the foregoing cases were again examined and the court held: "Whatever be the rule elsewhere, it is the firmly established doctrine here that if parties to the contract agree that if a dispute arise between them that such dispute shall be submitted to arbitration, refusal to arbitrate or no arbitration is not a defense to an action brought on such contract by one of the parties thereto, as the effect of such agreement is to oust the courts of their legitimate jurisdiction and is contrary to public policy and therefore void."

7. The district court made an order allowing counsel for Bachler a certain sum of money as an attorney's fee, and ordered the amount allowed taxed as part of the costs of the case to the Insurance Company. This order of the court is assailed on two grounds: (1.) That there was no evidence before the court to show that the amount allowed as an attorney fee was a reasonable fee for services rendered in the case. The order of the court by which an attorney

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fee was taxed as part of the costs in the action was not made one of the grounds of the motion filed by the Insurance Company for a new trial, nor is this action of the court subsequently assigned as error in the petition in error filed in this court; and the Insurance Company filed no motion in the district court to retax the costs. The ruling of a district court in the taxation of costs has been frequently before this court. One of the later expressions on the subject is found in *Real v. Honey*, 39 Neb., 516, in which the opinion was prepared by the present chief justice, NORVAL, and the conclusion reached thus stated in the syllabus: "In order to review the question of taxation of costs, a motion to retax the costs must be made in the trial court, and a ruling obtained thereon by that court." Whether the district court erred then in allowing counsel for Bachler an attorney's fee and ordering it to be taxed as part of the costs is not before us for review. (2.) But it is argued that the law under which this attorney fee was allowed is unconstitutional, and that therefore the order of the court was void. It is admitted that this order was made in pursuance of section 45, chapter 43, Compiled Statutes, 1893, which provides, in substance, that the court, upon rendering judgment against an insurance company in a suit upon a policy issued insuring real estate against loss or damage by fire, tornado, or lightning, where such property shall have been wholly destroyed, shall allow the plaintiff in the suit a reasonable sum as an attorney's fee, to be taxed as part of the costs. This section of the statute was construed by this court in *Hanover Fire Ins. Co. v. Gustin*, 40 Neb., 828, and it was there held that the courts of the state, by virtue of this provision of the statute, had the power, upon rendering judgment against an insurance company on any policy of insurance on real property, to allow the plaintiff in the action a reasonable sum as an attorney's fee to be taxed as part of the costs in the case. The constitutionality of the law, however, was not

raised in the argument, nor was the point decided in the case. Here it is argued that the law is unconstitutional, because it is class or special legislation. No authority is cited in support of this proposition, nor do we think any can be found. The subjects of special legislation prohibited by the constitution are all enumerated in section 15, article 3, of that instrument. This section of the constitution does not prohibit the legislature from passing such a law as the one under consideration. That the legislature may legislate upon any subject not prohibited by the constitution is a proposition too well recognized to call for the citation of authorities in its support. We know of nothing in the constitution which prohibits the legislature from enacting that the successful party in litigation may recover a judgment against his adversary for the amount of the costs expended or accrued by him in the prosecution of such suit, nor do we know of anything that prohibits the legislature from including in the term costs a reasonable attorney's fee. We conclude, therefore, that the law assailed as unconstitutional is a valid law; that it is not within said section 15 of the constitution which prohibits special legislation. (*State v. Berka*, 20 Neb., 375; *McClay v. City of Lincoln*, 32 Neb., 412; *Lancaster County v. Trimble*, 33 Neb., 121; *State v. Robinson*, 35 Neb., 401; *Koen v. State*, 35 Neb., 676; *State v. Norris*, 37 Neb., 299; *Hunzinger v. State*, 39 Neb., 653.) It is said that this act is class legislation because it applies only to insurance companies; but where a law is general and uniform throughout the state, and operates alike upon all persons and localities of a class, it is not objectionable as wanting uniformity of operation.

8. The final argument that the judgment is contrary to the law of the case is this, the insurance policy provided: "It is further declared to be a condition precedent to the granting of insurance that the amount claimable hereunder shall not exceed the actual loss ascertained as above,

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any so called valued policy law to the contrary notwithstanding." The building was insured in the sum of \$1,500 and was totally destroyed by fire. The contention is that the actual value of the building was less than the sum for which it was insured, and that by the provision quoted above from the contract of insurance Bachler agreed, in effect, that the Insurance Company should not be liable to him for any greater sum than the actual value of the building; that this contract was a valid one, and that the courts are bound to enforce it. This precise question was before this court in *Home Fire Ins. Co. v. Bean*, 42 Neb., 537, and the point was decided adversely to the contention of the plaintiff in error here. HARRISON, J., speaking for the court, said: "Where real property is wholly destroyed by fire, any provision of a policy of insurance covering such property which in any manner attempts to limit the amount of the loss to less than the sum written in the policy is in conflict with the statutory rule, invalid, and will not be enforced." This case is decisive of the question under consideration. The judgment of the district court is

AFFIRMED.

NORVAL, C. J., not sitting.

44	568
49	819
50	386
54	308
54	742
55	130

**HOME FIRE INSURANCE COMPANY OF OMAHA V.
HAMMANG BROTHERS & COMPANY.**

FILED APRIL 4, 1895. No. 5922.

1. **Insurance: ADDITIONAL RISKS: WRITTEN CONSENT: WAIVER: NOTICE: PRINCIPAL AND AGENT.** The plaintiff in error had an insurance risk of \$1,000 on the property of the defendants in error. At the same time another insurance company had a risk of \$1,000 on the same property. The plaintiff in error knew of

the risk carried by the other company. The day before the risk of the plaintiff in error expired its agent requested permission of the defendants in error to write them a policy for \$1,500 on the insured property to take the place of the policy about to expire. The defendants in error consented, cautioning the agent at the time to make a memorandum in writing on the new policy of the existence of the \$1,000 of insurance held by the other insurance company. The agent promised to do this, and the next day wrote the policy in suit, but forgot to make the memorandum thereon of the other insurance. The agent was a banker, and after writing the policy in suit he placed it in a vault in his bank, in which the defendants in error kept their private papers, and they never saw the policy until after the loss occurred. In a suit upon the policy the insurance company defended on the ground that the policy in suit was never in force because the existence of the other insurance policy was not indorsed on the policy in suit when it was issued. The policy provided that it should be void if there was at its date any other insurance on the insured property, unless consent of the company thereto should be indorsed on the policy. *Held*, (1) That the existence of the additional insurance on the property did not of itself render the policy in suit void, but only voidable at the election of the insurer; (2) that such provision was inserted in the policy for the benefit of the insurer and was a provision which it might waive (*Hughes v. Ins. Co. of North America*, 40 Neb., 626, followed); (3) that the insurance company having written the policy in suit with full knowledge of the existence of the other policy is estopped from insisting that the policy in suit never took effect because there was indorsed thereon no memorandum of the existence of the other policy (*Phenix Ins. Co. v. Covey*, 41 Neb., 724, followed); (4) that the agent's knowledge, at the time he wrote the policy in suit, of the additional insurance on the insured property was the knowledge of the insurance company and that it was bound thereby.

2. —: PROOFS OF LOSS: WAIVER. Another defense of the insurance company was that the insured had not furnished proofs of loss as required by the policy. A written statement of facts concerning the loss sworn to by the insured and furnished to the insurer set out in the opinion, and (1) *held* to be a sufficient compliance with the provision of the policy requiring the insured to furnish proofs of loss. *Hanorer Fire Ins. Co. v. Gustin*, 40 Neb., 828, followed. (2.) The conduct of the insurer after being advised of the destruction of the insured property, set out in the opinion, and *held* that the insurer by such conduct waived the furnishing of any proof of loss whatever. *State Ins. Co. v. Schreck*,

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27 Neb., 527, and *Hartford Fire Ins. Co. v. Meyer*, 30 Neb., 135, followed. (3.) That the refusal of the insurer to pay the loss, and its defense made thereto on the ground that the policy in suit was not in force at the date of the destruction of the insured property, was a waiver by the insurer of the provision of the policy requiring the insured to furnish it proofs of loss. *Dwelling House Ins. Co. v. Brewster*, 43 Neb., 528, followed.

3. ———: ———: ———. The provision of an insurance policy requiring proof of loss to be furnished the insurer within a specified time and in a particular manner is waived by the insurer, if, with a knowledge of the fire, its adjusting agent goes upon the ground, examines into the circumstances of the fire, takes possession of the books and invoices of the insured, and with his help makes an estimate of the amount of the loss. *Union Ins. Co. v. Barwick*, 36 Neb., 223, followed.
4. ———: ———: ———. Where the proof of loss submitted to an insurer is unsatisfactory it should return the same to the insured within a reasonable time, stating in what respect it is considered defective; and if it fails to do so it will be held to have waived any defect in such proof. *Phenix Ins. Co. v. Rad Bila Hora Lodge*, 41 Neb., 21, followed.
5. ———: CERTIFICATE OF MAGISTRATE: VALIDITY OF PROVISION: WAIVER. The insurance policy in suit contained a provision to the effect that in case a loss occurred, as a condition precedent to the right of the insured to maintain an action therefor he should furnish to the insurer a certificate of a magistrate, notary public, or commissioner of deeds, whose office was next to the place of the fire, stating that such officer had examined the circumstances of the fire, knew the character and financial condition of the insured, and believed that he had without fraud sustained loss on the insured property to an amount certified by the officer. A defense of the insurance company to the action was that no such certificate was furnished. *Held*, (1) That the insurance company by its conduct, set out in the opinion, after being advised of the loss, and by refusing to pay the loss and defending against the same on the ground that the policy in suit was not in force at the date of the loss, had waived the furnishing of such certificate, the same being part of proof of loss; (2) that the validity of any such provision was doubtful; (3) the constitution guaranties to the citizen a remedy by due course of law for any injury to himself, his property, or reputation; and it seems that the right of an insured to maintain an action in the courts of the state on an insurance contract cannot be made to depend upon his first furnishing to the insurer a certificate of a notary public

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as to his moral character, financial standing, and the notary's opinion as to whether the loss resulted from the fraud of the insured, nor as to the amount of such loss.

ERROR from the district court of Washington county.
Tried below before SCOTT, J.

The facts are stated by the commissioner.

Jacob Fawcett, for plaintiff in error:

Where a policy requires the furnishing of proofs of loss as a condition precedent to a right of recovery on the policy the proofs must be furnished. (*German Ins. Co. v. Fairbank*, 32 Neb., 757.)

The defendants in error never furnished the plaintiff in error with a certificate under the hand and seal of the magistrate, notary public, or commissioner of deeds nearest the place of the fire. There can therefore be no recovery. (*Columbian Ins. Co. v. Lawrence*, 2 Pet. [U. S.], 25; *Leadbetter v. Etna Ins. Co.*, 13 Me., 265; *Inman v. Western Fire Ins. Co.*, 12 Wend. [N.Y.], 452; *Johnson v. Phoenix Ins. Co.*, 112 Mass., 49; *Roumage v. Mechanics Fire Ins. Co.*, 1 Green [N. J. Law], 110; *Protection Ins. Co. v. Pher-son*, 5 Ind., 417; *Noonan v. Hartford Fire Ins. Co.*, 21 Mo., 81; *Cornell v. Hope Ins. Co.*, 3 Martin n. s. [La.], 223; *Kerr v. British American Assurance Co.*, 32 U. C. Q. B., 569; *Cayon v. Dwelling House Ins. Co.*, 32 N. W. Rep. [Wis.], 540; *Morrow v. Waterloo County Mutual Fire Ins. Co.*, 39 U. C. Q. B., 441; *Campbell v. American Popular Life Ins. Co.*, 1 McArthur [D. C.], 246; Wood, Insurance, sees. 416, 713; *Williams v. Queens Ins. Co.*, 19 Ins. L. J. [Conn.], 26; *Lane v. St. Paul Fire & Marine Ins. Co.*, 52 N. W. Rep. [Minn.], 649.)

The policy was void by reason of the additional insurance. (*German Ins. Co. v. Heiduk*, 30 Neb., 288; *Cleaver v. Traders Ins. Co.*, 32 N. W. Rep. [Mich.], 662; *England v. Westchester Fire Ins. Co.*, 51 N. W. Rep. [Wis.],

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946; *Johnson v. Dakota Fire & Marine Ins. Co.*, 45 N. W. Rep. [N. Dak.], 799; *Wilkins v. State Ins. Co.*, 45 N. W. Rep. [Minn.], 2; *Jennings v. Chenango County Mutual Ins. Co.*, 2 Denio [N. Y.], 75; *Brown v. Cattaraugus County Mutual Ins. Co.*, 18 N. Y., 385; *Chase v. Hamilton Ins. Co.*, 20 N. Y., 52; *Western Assurance Co. v. Rector*, 3 S. W. Rep. [Ky.], 415; *McNierney v. Agricultural Ins. Co.*, 48 Hun [N. Y.], 244; *Franklin Fire Ins. Co. v. Martin*, 8 Ins. L. J. [N. Y.], 134; *Smith v. Cash Mutual Fire Ins. Co.*, 24 Pa. St., 324; *Loehner v. Home Mutual Ins. Co.*, 17 Mo., 248; *Hartford Fire Ins. Co. v. Webster*, 69 Ill., 392; *Deweese v. Manhattan Ins. Co.*, 6 Vroom [N. J.], 366; *Winneshiek Ins. Co. v. Holzgraffe*, 53 Ill., 517; *Ostrander, Fire Insurance*, 72; *Walker v. State Ins. Co.*, 26 Pac. Rep. [Kan.], 718; *Herbst v. Lowe*, 65 Wis., 316; *Ripley v. Aetna Ins. Co.*, 30 N. Y., 136; *Glendale Mfg. Co. v. Protection Ins. Co.*, 21 Conn., 37; *Sheldon v. Hartford Fire Ins. Co.*, 22 Conn., 235; *Barrett v. Union Mutual Fire Ins. Co.*, 7 Cush. [Mass.], 180; *Insurance Co. v. Mowry*, 96 U. S., 544; *Smith v. Cash Mutual Fire Ins. Co.*, 24 Pa. St., 320; *Hartford Fire Ins. Co. v. Walsh*, '54 Ill., 168; *Higginson v. Dall*, 13 Mass., 96; *Whitney v. Haven*, 13 Mass., 172; *Weston v. Emes*, 1 Taunt. [Eng.], 115; *Swan v. Watertown Fire Ins. Co.*, 96 Pa. St., 42; *Greenwood v. New York Life Ins. Co.*, 27 Mo. App., 411.)

W. S. Cook and D. Z. Mummert, contra:

The company, by sending its agent to adjust the loss, calling for bills and additional evidence, waived proofs of loss and certificate of notary. (*Cannon v. Home Ins. Co. of New York*, 53 Wis., 585; *Brown v. State Ins. Co.*, 74 Ia., 428; *Oshkosh Gas Light Co. v. Germania Fire Ins. Co.*, 71 Wis., 454; *Zielke v. London Assurance Corporation*, 64 Wis., 442; *Green v. Des Moines Fire Ins. Co.*, 50 N. W. Rep. [Ia.], 558; *Bach v. State Ins. Co.*, 64 Ia., 595; *Merchants Ins. Co. v. Holthaus*, 43 Mich., 423; *Bromberg v. Minne-*

sola Fire Association, 45 Minn., 318; *Miller v. Hartford Fire Ins. Co.*, 70 Ia., 704; *Harriman v. Queen Ins. Co.*, 49 Wis., 71; *Commercial Union Assurance Co. v. Hocking*, 115 Pa. St., 407; *Union Ins. Co. v. Barwick*, 36 Neb., 223; *German-American Ins. Co. v. Barwick*, 36 Neb., 223; *Billings v. German Ins. Co.*, 34 Neb., 502.)

Knowledge by the agent of the existence of the additional insurance is knowledge of the plaintiff, and the failure to make objections is a complete waiver of any objection that the additional insurance was not indorsed upon the policy. (*Copeland v. Dwelling House Ins. Co.*, 43 N. W. Rep. [Mich.], 991; *Tubbs v. Dwelling House Ins. Co.*, 48 N. W. Rep. [Mich.], 296; *Kitchen v. Hartford Fire Ins. Co.*, 23 N. W. Rep. [Mich.], 616; *Brandup v. St. Paul Fire & Marine Ins. Co.*, 7 N. W. Rep. [Minn.], 735; *Bennett v. Council Bluffs Ins. Co.*, 31 N. W. Rep. [Ia.], 948; *Cleaver v. Traders Ins. Co.*, 39 N. W. Rep. [Mich.], 571; *Barnes v. Hekla Fire Ins. Co.*, 39 N. W. Rep. [Ia.], 122; *Hamilton v. Home Ins. Co.*, 7 S. W. Rep. [Mo.], 261; *Kausel v. Minnesota Farmers Mutual Fire Association*, 16 N. W. Rep. [Minn.], 430; *Reynolds v. Iowa & Nebraska Ins. Co.*, 46 N. W. Rep. [Ia.], 659; *Crouse v. Hartford Fire Ins. Co.*, 44 N. W. Rep. [Mich.], 496; *Gristock v. Royal Ins. Co.*, 47 N. W. Rep. [Mich.], 549; *Reiner v. Dwelling House Ins. Co.*, 42 N. W. Rep. [Wis.], 208; *Donnelly v. Cedar Rapids Ins. Co.*, 28 N. W. Rep. [Ia.], 607; *Temmink v. Metropolitan Life Ins. Co.*, 40 N. W. Rep. [Mich.], 469; *Eggleston v. Council Bluffs Ins. Co.*, 21 N. W. Rep. [Ia.], 652; *Brumfield v. Union Ins. Co.*, 7 S. W. Rep. [Ky.], 893; *Michigan Shingle Co. v. State Investment & Ins. Co.*, 53 N. W. Rep. [Mich.], 545; *Ins. Co. of North America v. McLimans*, 28 Neb., 653.)

W. C. Walton, also for defendant in error.

RAGAN, C.

Hammang Bros. & Co. brought this suit in the district court of Washington county against the Home Fire Insurance Company of Omaha, Nebraska, (hereinafter called the "Insurance Company,") to recover the value of certain merchandise which they alleged they owned, which had been insured against loss or damage by fire by the Insurance Company, and which merchandise had been destroyed by fire. Hammang Bros. & Co. had a verdict and judgment, and the Insurance Company brings the same here for review. There is no contention here but that the policy sued upon was issued, that the premium was paid, and that the property was destroyed by fire; nor is there any claim made that the actual loss sustained by Hammang Bros. & Co. was not greater than the amount of the insurance; nor is it claimed that the fire resulted from any fraud or neglect on the part of the insured. To reverse the judgment of the district court counsel for the Insurance Company has argued four points here, which we notice as follows:

1. One of the defenses the Insurance Company interposed to this action in the district court was that the insured did not furnish to the Insurance Company proofs of loss as required by the insurance contract. The policy provided: "When a fire has occurred, damaging the property hereby insured, the assured shall give immediate notice and render a particular account of such loss, signed and sworn to by them; if there is other insurance, shall give a detailed account of same, with copies of the written portions of all policies; shall also give the actual cash value of the property, their interest therein, the interest of all other parties therein, if any, giving their names; the amount of the loss or damage; for what purpose and by whom the building insured or containing the property insured, and the several parts thereof, were used; when and how the

fire originated; and an itemized estimate of value of the property destroyed." The fire occurred on the 31st day of October, 1890. On the 25th day of November, 1890, the assured made a statement in writing, swore to the same before a justice of the peace, and transmitted it to the Insurance Company. This written statement or proof of loss set out that a fire had occurred on the 31st of October, 1890, destroying and injuring the property covered by the policy in suit; that the date of such policy was the 14th of June, 1890; that the policy had been issued to Hammang Bros. & Co.; that the amount of the insurance was \$1,500; that the property damaged and destroyed consisted of hardware, stoves, tinware, and other articles usually kept in a hardware store; that the loss was payable to Hammang Bros. & Co.; that the Omaha Fire Insurance Company of Omaha, Nebraska, had also a policy of \$1,000 on the destroyed property; that the goods saved were well protected; that an inventory was being made of the goods saved; that the books of the firm of Hammang Bros. & Co. had been saved; that the fire which destroyed the insured property was communicated to the building in which it was situate from a fire in a livery barn across an alley west of the store of Hammang Bros. & Co.; that an inventory of the stock of Hammang Bros. & Co. had been taken on January 1, 1890; that the condition of the insured property saved was fairly good; and that there had been no change in the risk or its external exposures since the policy was issued. It will be seen that this proof of loss furnished by Hammang Bros. & Co. to the Insurance Company is not a strict compliance with the requirements of the policy, but we think it is a substantial compliance with that provision of the insurance contract. Technical accuracy in making out a proof of loss is not essential. The proof of loss is sufficient if it shows upon its face that the insured made an honest effort to comply with the requirement of the insurance contract. (*Continental Ins.*

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Co. v. Lippold, 3 Neb., 391; *German-American Ins. Co. v. Etherton*, 25 Neb., 505; *Hanover Fire Ins. Co. v. Gustin*, 40 Neb., 828.)

The insured property was situate in the town of Arlington, and the Insurance Company was domiciled in the city of Omaha. Immediately after the receipt by the Insurance Company of the proof of loss hereinbefore mentioned the Insurance Company sent to Arlington its adjuster. This adjuster remained there several days inquiring into the circumstances of the fire and the amount of the loss. He took possession of the books and invoices of the insured, and estimated the value of the property saved from the fire, the amount of stock on hand at the time the fire occurred, and the amount of the loss or damage which the insured had sustained by reason of the fire, and offered to pay the insured \$900 in settlement of their loss. The Insurance Company, when it received the paper called a "proof of loss," hereinbefore referred to, retained possession of the same, made no complaints to the insured that the proofs furnished were insufficient or defective; nor did it request the insured to furnish any other or different proof of loss at any time or place. The Insurance Company then by its conduct waived the insufficiency of the proofs of loss furnished it by the insured, and in fact waived any proof of loss whatever. For the purpose of settling—if such a question can ever be settled—that the clause in an insurance contract requiring the insured in case of the destruction of the insured property to furnish the insurer proofs of loss is inserted in the insurance contract for the benefit of the insurer, and the furnishing of such proofs of loss may be waived by such conduct of the insurer, having knowledge of the loss, as establishes an intention on his part to waive the furnishing of such proofs of loss, we collate some of the authorities in point.

In *State Ins. Co. v. Schreck*, 27 Neb., 527, *Hartford Fire Ins. Co. v. Meyer*, 30 Neb., 135, and *St. Paul Fire & Marine*

Ins. Co. v. Gotthelf, 35 Neb., 351, it was held: "Provisions of an insurance policy covering a stock of goods for notice of loss within a specified time and in a particular manner will be held to have been waived by the insurer where, with knowledge of the loss of part of said stock by fire, it, by its adjusting agent, demands and obtains possession of the remainder of the goods and books of the insured and is engaged several days, with the help of the latter, in ascertaining the amount of the loss."

In *Union Ins. Co. of California v. Barwick*, 36 Neb., 223, and *Western Home Ins. Co. v. Richardson*, 40 Neb., 1, it was held: "In case the preliminary proof of loss submitted to the company is unsatisfactory, it should return the same to the insured within a reasonable time, stating in what respect it is considered defective, and if it fails to do so, but rejects such proof on the ground that the same was not furnished in proper time, it cannot afterwards avail itself of the insufficiency of such preliminary proof."

See *Phoenix Ins. Co. v. Rad Bila Hora Lodge*, 41 Neb., 21; *Harriman v. Queen Ins. Co. of London*, 5 N. W. Rep. [Wis.], 12; *Cannon v. Home Ins. Co. of New York*, 11 N. W. Rep. [Wis.], 11; *Zielke v. London Assurance Corporation*, 25 N. W. Rep. [Wis.], 436; *Bromberg v. Minnesota Fire Association*, 47 N. W. Rep. [Minn.], 975; *Mercantile Ins. Co. v. Holthouse*, 5 N. W. Rep. [Mich.], 642; *Green v. Des Moines Fire Ins. Co.*, 50 N. W. Rep. [Ia.], 558; *Commercial Union Assurance Co. v. Hocking*, 8 Atl. Rep. [Pa.], 589. In this last case the court held: "An insurance company which receives proofs of loss when offered, refers them to its adjuster, and retains them without objection or complaint for five months, will be held to waive a compliance with the conditions of the policy even though the proofs were not made within the time nor in the form required by the policy."

But, as we shall see hereafter, the Insurance Company refused to pay this loss and defended this action on the

ground that the policy in suit was not in force at the time the loss occurred. This, then, constituted another waiver on the part of the Insurance Company of the furnishing to it of proofs of loss by the insured. "The absolute denial by the insurer of all liability on the ground that the policy was not in force at the time of the loss is a waiver of the preliminary proofs of loss required by the policy." (*Phenix Ins. Co. v. Bachelder*, 32 Neb., 490; *Western Home Ins. Co. v. Richardson*, 40 Neb., 1; *Omaha Fire Ins. Co. v. Dierks*, 43 Neb., 473; *Dwelling House Ins. Co. v. Brewster*, 43 Neb., 528.)

2. Another defense interposed in the court below and argued here is this: The policy, as already seen, provided that in case a loss of the insured property should occur that the insured should furnish the Insurance Company with proofs of loss and "shall also produce a certificate, under the hand and seal of a magistrate, notary public, or commissioner of deeds nearest to place of fire, * * * stating that he has examined the circumstances attending the loss, knows the character and condition of the assured, and firmly believes that the assured has without fraud sustained loss on the property insured to the amount which he shall so certify." The insured furnished no such certificate as the one required by this provision; and the argument is that therefore the insured could not recover. Of this defense we have this to say: (1.) That it was really included in the defense of the failure of the insured to furnish the Insurance Company proofs of loss. All that has been said above in reference to that defense applies to this defense and argument. (2.) We very seriously doubt if any such provision in the contract can be enforced. Here the argument of the Insurance Company in effect is that we insured your property and agreed with you that in case it should be lost and damaged that we would pay the amount of such loss or damage. You have paid us a premium for carrying this risk, and the property has been destroyed without

fault on your part; but you have not furnished us the certificate of an officer whose office is next to the place where the fire occurred, certifying that he has examined the circumstances attending the loss, knows your character and financial condition, and that he believes you have sustained loss without fault on your part; and, until you furnish such certificate, you cannot maintain a suit in the courts of the state on this contract. The right of a citizen to maintain an action in the courts of this state is fixed by the constitution and the laws thereof, and we do not think that right can be made to depend upon the whim of a justice of the peace or a notary public. Suppose that this justice of the peace should be the enemy of the insured, or for any other reason should refuse to furnish the insured a certificate of good moral character and should refuse to examine into the circumstances attending the loss and the financial condition of the insured. How is the insured to compel the making of this certificate? We are aware that the supreme court of the state of Minnesota in *Lane v. St. Paul Fire & Marine Ins. Co.*, 52 N. W. Rep., 649, sustained a provision like the one under consideration, and held that the furnishing of the certificate was a condition precedent to the right of the insured to recover, and that his inability to furnish the certificate because of the refusal of the magistrate to give it afforded no excuse for the insured's failure. But it is to be remembered that in that state the legislature prescribes the terms and conditions of all fire insurance policies, and such was the policy considered in the case last cited. Furthermore, the constitution of this state provides: "All courts shall be open, and every person, for any injury done him in his lands, goods, person or reputation, shall have a remedy by due course of law and justice administered without denial or delay." (Constitution, sec. 13, art. 1.) It may be that the legislature has the authority to provide that before an insured can maintain an action in the courts to recover for a

loss on an insurance policy he must procure the certificate of a magistrate next to where the loss occurred that he has examined into the conditions of the loss and believes that it occurred without the fault of the insured, that the insured is of good moral character, and that he is acquainted with his financial condition. But we shall hesitate a great while before we uphold any such provision as this in the absence of express legislation requiring it. We are also aware that provisions similar to this have been considered and upheld in other courts; and it is said that the rule announced in the Minnesota case is sustained by a line of authorities reaching back to an early date in the English courts. However this may be, and however venerable such a rule may be, however much it may be sanctified by authority and covered with the dust and cobwebs of ages, we decline to be bound by it.

3. The policy provided it should be void "if there is now or shall hereafter be obtained any other insurance, whether valid or not, on the said property or any part thereof," unless the consent of the company to such other insurance was indorsed on the policy. Another defense of the Insurance Company in the district court was that at the time of the issuance of the policy in suit the insured had a policy of one thousand dollars upon the insured property issued by the Omaha Fire Insurance Company, and that the existence of such latter policy, or the consent of the Insurance Company thereto, was not indorsed in writing on the policy in suit. Hammang Bros. & Co. in reply admitted the facts stated as a defense and pleaded in avoidance thereof, or as an estoppel against the Insurance Company, that the Insurance Company wrote the policy in suit with actual knowledge of the existence of the policy held by them in the Omaha Fire Insurance Company. The evidence shows that prior to the 14th of June, 1890, one Badger, a banker in Arlington, was the agent of the Insurance Company; that a man named Cook, in said town

of Arlington, was the agent of the Omaha Fire Insurance Company; that for the year immediately preceding June 14, 1890, the Omaha Fire Insurance Company had a risk upon the property of the insured for one thousand dollars; that about the 13th of June, 1890, Mr. Badger went to Hammang Bros. & Co. and said to them that their policy in the Insurance Company would expire by the 14th of June and asked them to permit him to write them a policy for two thousand dollars on their stock of merchandise. The insured responded that they were carrying two thousand dollars of insurance then, one thousand in the Omaha Fire Insurance Company and one thousand dollars in Badger's company (the Insurance Company). Mr. Badger replied that he knew that, but that the insured, considering the amount of stock they carried, should carry more than two thousand, and asked them if they would not allow him to write a policy in his company to take the place of the one it carried, as that would expire by the 14th of June, for fifteen hundred dollars, thus making the total amount of insurance of the insured on their stock twenty-five hundred dollars. The insured demurred to this somewhat on the grounds that the rate was too high, but finally they authorized Badger to write on the 14th of June, 1890, the policy in suit for fifteen hundred dollars in the Insurance Company to take the place of the one the Insurance Company was carrying for one thousand dollars, and which would expire by the 14th of June. They also instructed Mr. Badger to make a memorandum in writing on the fifteen hundred dollar policy which he was about to issue to the effect that they had a thousand dollars of insurance at that time in the Omaha Fire Insurance Company on the same stock of merchandise. Mr. Badger promised to do this, and says in his testimony that the only reason he did not it was because he forgot it. On the 14th day of June, Badger wrote the policy in suit, and on that date, or very shortly after that, wrote a letter to the Insurance Company, his

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principal, stating to it that he had written a policy for Hammang Bros. & Co. on the 14th of June, 1890, for a year for fifteen hundred dollars to take the place of their policy of one thousand dollars which expired on that date, and in this letter he informed the Insurance Company, his principal, that the Omaha Fire Insurance Company had a policy of one thousand dollars on the same property. The policy in suit, after it was written by Mr. Badger, was placed by him in a vault in his bank, where it appears that Hammang Bros. & Co. kept their private papers, and they, nor either of them, ever saw the policy until after the fire occurred out of which this suit arose. Badger collected from Hammang Bros. & Co. the premium for the policy in suit and duly remitted it to the Insurance Company. It appears also from the evidence that Badger, before he wrote the policy in suit, and before talking with Hammang Bros. & Co. of writing it, knew through Mr. Cook, the agent of the Omaha Fire Insurance Company, that that company had a policy of one thousand dollars on the same property insured by the policy here.

The argument of counsel for the Insurance Company here is not that Hammang Bros. & Co. concealed from the Insurance Company the existence of the policy in the Omaha Fire Insurance Company, not that Badger made any inquiries as to any other insurance outstanding on the property and that Hammang Bros. & Co. answered falsely such inquiries or kept silent, but the entire defense and the argument here are rested upon the proposition that because no memorandum in writing of the existence of the policy in the Omaha Fire Insurance Company was indorsed on the policy in suit, that the latter never was in force. If Hammang Bros. & Co. had themselves violated the provision of the policy in reference to additional insurance on the property such violation would not of itself have rendered the policy in suit absolutely void, but only voidable at the election of the insurer. Such a provision is

inserted in insurance policies for the benefit of the insurer and is a provision which it may waive. (*Hughes v. Ins. Co. of North America*, 40 Neb., 626.) But the evidence quoted above shows that the insured have not violated any provision of the policy with reference to other insurance than that in suit. The insured did not write the policy in suit. It was not their business to write it. They fully and fairly disclosed to the agent of the Insurance Company—what he already knew—the existence of the policy in the Omaha Fire Insurance Company, and requested this agent to make a memorandum in writing on the policy in suit of the existence of the other policy. The Insurance Company's agent intended to do this, and it must be said in justice to Mr. Badger that his failure to make this memorandum seems to have been the result of forgetfulness. Here, then, was actual knowledge of the additional insurance complained of in the possession of the Insurance Company's agent when he solicited and wrote the insurance policy in suit. This knowledge of the agent was the knowledge of the company. Knowledge on the part of the agent of an insurance company, authorized to issue its policies, of facts which render the contract voidable at the insurer's option, is knowledge of the company. (*Gans v. St. Paul Fire & Marine Ins. Co.*, 43 Wis., 108; *Bennett v. Council Bluffs Ins. Co.*, 31 N. W. Rep. [Ia.], 948.) This precise question was before this court in *Phoenix Ins. Co. v. Covey*, 41 Neb., 724. RYAN, C., writing the opinion of the court, said: "Where an insurance agent, with authority to receive premiums and issue policies, exercises such authority with knowledge of the existence of concurrent insurance on the premises, the company is estopped, after a loss, to insist that the policy is void because consent to such concurrent insurance was not given in writing." This case is decisive of the question under consideration. We are satisfied with the rule as there announced, and adhere to it. That it states the rule correctly, we have no

doubt, and that it is sustained by the authorities see, among others, the following cases: *State Ins. Co. v. Jordan*, 29 Neb., 514; *Billings v. German Ins. Co.*, 34 Neb., 502; *German Ins. Co. v. Penrod*, 35 Neb., 273; *German Ins. Co. v. Rounds*, 35 Neb., 752; *McEwen v. Montgomery County Mutual Ins. Co.*, 5 Hill [N. Y.], 101; *American Ins. Co. v. Gallatin*, 3 N. W. Rep. [Wis.], 772; *Oshkosh Gas Light Co. v. Germania Fire Ins. Co.*, 37 N. W. Rep. [Wis.], 819; *Reiner v. Dwelling House Ins. Co.*, 42 N. W. Rep. [Wis.], 208; *Vankirk v. Citizens Ins. Co.*, 48 N. W. Rep. [Wis.], 798; *Kitchen v. Hartford Fire Ins. Co.*, 23 N. W. Rep., [Mich.], 616. In this last case the court said: "An insurance company is bound by the acts or conduct of an agent who has power to solicit insurance, make examination and survey of the premises, take applications and forward them to the home or branch office, deliver policies, and collect premiums; and when a party insured notifies such agent of his intention to take additional insurance, and when he has obtained such insurance requests him to inform his company of that fact, the company cannot, after a loss, hold the policy issued by it void because its written consent to the taking of such additional insurance was not indorsed on the policy, as provided therein." (*Crouse v. Hartford Fire Ins. Co.*, 44 N. W. Rep. [Mich.], 496; *Gristock v. Royal Ins. Co.*, 47 N. W. Rep. [Mich.], 549; *Cleaver v. Traders Ins. Co.*, 39 N. W. Rep. [Mich.], 571; *Temnink v. Metropolitan Life Ins. Co.*, 40 N. W. Rep. [Mich.], 469; *Copeland v. Dwelling House Ins. Co.*, 43 N. W. Rep. [Mich.], 991; *Tubbs v. Dwelling House Ins. Co.*, 48 N. W. Rep. [Mich.], 296; *Brandup v. St. Paul Fire & Marine Ins. Co.*, 7 N. W. Rep. [Minn.], 735; *Kansel v. Minnesota Farmers Mutual Fire Ins. Association*, 16 N. W. Rep. [Minn.], 430; *Eggleston v. Council Bluffs Ins. Co.*, 21 N. W. Rep. [Ia.], 652; *Donnelly v. Cedar Rapids Ins. Co.*, 28 N. W. Rep. [Ia.], 607; *Miller v. Hartford Fire Ins. Co.*, 29 N. W. Rep. [Ia.], 411; *Bennett v. Council Bluffs Ins. Co.*, 31

N. W. Rep. [Ia.], 948; *Mattocks v. Des Moines Ins. Co.*, 37 N. W. Rep. [Ia.], 174; *Brown v. State Ins. Co.*, 38 N. W. Rep. [Ia.], 135; *Barnes v. Hekla Fire Ins. Co.*, 39 N. W. Rep. [Ia.], 122; *Reynolds v. Iowa & Nebraska Ins. Co.*, 46 N. W. Rep. [Ia.], 659; *Hamilton v. Home Ins. Co.*, 7 S. W. Rep. [Mo.], 261; *Brumfield v. Union Ins. Co.*, 7 S. W. Rep. [Ky.], 893.)

4. But it is argued that the evidence of Mr. Badger, the Insurance Company's agent, and the evidence of the members composing the firm of Hammang Bros. & Co., showing that at the time and before the issuance of the policy in suit that Badger knew of the existence of the policy in the Omaha Fire Insurance Company, and agreed to and did write the policy sued on here, and agreed to make a memorandum in writing thereon of the existence of such Omaha Fire Insurance Company's policy, was incompetent, and that the court erred in admitting it. It is said that the effect of this evidence was to vary and contradict the terms of a written contract, to-wit, the policy between the parties. We think this evidence tended to prove the plea of estoppel set up by the insured to the defense of other insurance on the property made by the Insurance Company was competent and material, and we do not think the effect of the evidence was such as counsel contend.

5. The final assignment of error is that the court erred in not sustaining the application of the Insurance Company for a new trial on the ground of accident and surprise. We cannot consider this assignment, for the reason that the affidavits used in the district court in support of this ground of the motion for a new trial are not preserved in the bill of exceptions.

The judgment of the district court was right. It is accordingly in all things

AFFIRMED.

NORVAL, C. J. I concur in the result.

F. KUHL ET AL. V. PIERCE COUNTY.

FILED APRIL 4, 1895. No. 6062.

1. **Error Proceedings: PARTIES.** All parties to a joint judgment are necessary parties to a petition in error filed here by one of their number to reverse it; but this rule does not require that all the parties to a suit in which a judgment has been rendered should be made parties to the error proceedings instituted here for a review of such judgment. Only the parties who are liable on, or bound by, the judgment are necessary parties to the proceeding in error here.
2. **Reference: RIGHT TO JURY TRIAL.** A legal action cannot be referred except by consent of parties, as a litigant cannot be deprived of his constitutional right to a jury for the trial of issues of fact made by the pleadings in a legal action. *Mills v. Miller*, 3 Neb., 87, followed.
3. **Equity: ACCOUNTING: ACTION AGAINST COUNTY TREASURER: EMBEZZLEMENT: JURY TRIAL: PLEADING: RIGHTS OF SURETIES.** To recover public moneys collected and embezzled by him, Pierce county brought an action against its defaulting county treasurer and all the sureties on his two official bonds, the treasurer having been elected for two terms, the sureties on said bonds being different persons. The petition alleged that the ex-treasurer was insolvent, and that the county was unable to prosecute an action at law on either of said bonds because the books and records kept by the treasurer did not disclose when the defalcation complained of occurred, and there was no evidence known to the county by which it could prove, in an action at law, whether such defalcation occurred during the treasurer's first or second term of office. The prayer of the petition was for an accounting in equity. *Held*, (1) That the averments of the petition made out a cause of action in favor of the county upon contracts for the payment of money only unincumbered by any collateral agreements, contracts, or securities whatever; (2) that the action was one legal in its nature; (3) that the facts averred in the petition were not sufficient to entitle the county to equitable relief; (4) that the county would not be permitted to make use of a state of facts brought about by the neglect of the legal duties of its county board to deprive the sureties on their treasurer's official bond of their constitutional right to a jury trial; (5) that the sureties on the treasurer's bond were entitled to a jury for the trial of the issues of fact made by the pleadings.

44	584
54	798
55	7
55	577
44	584
58	33
50	38
44	584
50	300

ERROR from the district court of Pierce county. Tried below before KINKAID, J.

See opinion for statement of the case.

C. Hollenbeck, for plaintiffs in error:

There is no privity of interest between the sureties on the first and second bonds. The liability incurred by a surety on an official bond is for the term for which the officer was elected, and the courts have universally held that the liability of a surety on such bond is to be strictly construed according to the terms of the bond. (Murfree, *Official Bonds*, sec. 731.)

There is no trust, express or implied, in the office of county treasurer. His liability for the funds in his hands, or received by him in his official capacity, is absolute and unconditional. It is his duty to collect money and pay it over in the manner provided by law. This duty is strictly legal. He cannot evade it or excuse himself in any way for a non-compliance with it. If the money is stolen or destroyed through no act of his, he cannot be heard in defense to show acts of care or diligence for the purpose of escaping liability. He is an insurer of money in his hands. (Murfree, *Official Bonds*, sec. 694; *State v. Harper*, 6 O. St., 607; *Commonwealth v. Comly*, 3 Pa. St., 372; *United States v. Prescott*, 44 U. S., 578; *Muzzy v. Shattuck*, 1 Denio [N. Y.], 233.)

If the remedy in this action is purely legal then this action ought not to have been referred, and the court had, in that case, no authority to appoint a referee over the objection of the plaintiffs in error. (*Mills v. Miller*, 3 Neb., 87; *Kinkaid v. Hiatt*, 24 Neb., 562.)

The causes of action were improperly joined. (*Cassady v. Board of Trustees*, 93 Ill., 394; *Screwmen's Benevolent Association v. Smith*, 7 S. W. Rep. [Tex.], 793; *Oglesby's Sureties v. State*, 11 S. W. Rep. [Tex.], 873.)

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Discovery has ceased to be one of the objects sought by courts of equity. (*Lamaster v. Scofield*, 5 Neb., 148.)

Where an officer holds two successive terms of office and is a defaulter, the presumption of law is that such defalcation occurred during his last term of office. (*Kelley v. State*, 25 O. St., 567; *Morley v. Town of Metamora*, 78 Ill., 394.)

Powers & Hays, also for plaintiffs in error.

W. W. Quivey and Allen, Robinson & Reed, contra, cited: *State v. Churchill*, 3 S. W. Rep. [Ark.], 352; *Bruce v. United States*, 17 How. [U. S.], 437.

RAGAN, C.

At the general election held in November, 1887, one Carl Korth, was duly elected treasurer of Pierce county. He qualified by giving bond and entering upon the discharge of his duties. The plaintiffs in error (hereinafter called the "sureties") signed Korth's official bond as treasurer for the term for which he was elected and which expired on the first of January, 1890. At the November election, 1889, Korth was again elected treasurer of Pierce county for two years and again qualified and entered upon the discharge of his duties for the second term commencing January 1, 1890. A large number of parties became sureties on his official bond for his second term of office. None of the plaintiffs in error, the sureties, were signers of the second bond. On the 18th of December, 1890, Korth resigned and was found to be a defaulter, and this action was brought by Pierce county to the district court against Korth and all the sureties on both his bonds. The petition contained the necessary averments of the election of Korth as treasurer of the county for two terms as aforesaid; his acceptance of the office for each of said terms and his giving bonds to faithfully discharge the duties of his office, account for and pay over all moneys which should come

into his hands as such treasurer during each of said terms of office. The petition then alleged that Korth did at various times during the time he held said office misappropriate large amounts of money and convert the same to his own use, and that he was on the 18th of December, 1890, a defaulter in the sum of \$35,517.41, which sum he had neglected and refused to account for and pay over to the proper authorities; that Korth had resigned the office of treasurer and that he was wholly insolvent. The petition then alleged that the county "is unable to prosecute an action at law on either of said obligations for the reason that the books, papers, and records of said * * * treasurer * * * as compiled and made by said defendant Korth during the term that he exercised the duties and functions of said office, * * * and as said books now appear do not disclose and show wherein the said defalcation occurred, nor is there any record or evidence known to plaintiff whereby plaintiff can in any action at law show whether said defalcation occurred during the period of time covered by said first obligation or during the period of time covered by said second obligation." The prayer of the petition was that an accounting in equity might be had, to the end that it might be adjudged and decreed when the several misappropriations and conversions of money occurred, the amounts thereof, and for what amounts of the defalcation the sureties on the first and second bonds were respectively liable. The sureties demurred to this petition on the ground that the petition did not state facts sufficient to entitle the county to equitable relief. The signers or sureties on the second bond submitted a similar demurrer. These demurrers were by the court overruled and the "sureties" and the signers of the second bond answered. The answers among other defenses alleged that the petition did not state facts sufficient to entitle the plaintiff to equitable relief. No reply appears to have been filed by the county. After the issues were thus made up the sure-

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ties, and the signers of the second bond as well, demanded a jury trial, which was denied by the court, and on motion of the county the case was referred to a referee "to take the evidence and report the facts and evidence to this court." This order was made against the objection and exceptions of the sureties and the signers of the second bond as well. In due time the referee heard the evidence, made his findings of fact and reported the same, and on the 13th of October, 1892, the district court overruled the exceptions filed to the report of the referee and denied the motions for a new trial and entered three judgments as follows: (1) a judgment against Carl Korth only for \$37,777.40; (2) a judgment against the sureties only for \$14,544.18; (3) a judgment against the signers of the second bond only for the sum of \$23,233.22. Carl Korth has neither appealed from the judgment rendered against him nor filed in this court any petition in error to reverse the same. Such judgment, therefore, is not before us for review. Whatever conclusion may be reached in the matter under consideration here must be taken and understood as neither reversing, vacating, modifying, nor in any manner affecting the said judgment rendered in favor of Pierce county against Carl Korth. The signers of Korth's second bond have filed in this court a petition in error praying for a reversal of the judgment rendered by the district court against them; but as the judgment was rendered on the 13th of October, 1892, and their exceptions to the referee's report and their motion for a new trial overruled at the same time; and as they did not file in this court their petition in error until the 14th of January, 1895, we are precluded from reviewing the judgment rendered against the signers of the second bond. Hence, the conclusion reached in the matter before us must be taken and understood as not reversing, vacating, modifying, or in any manner whatever as affecting the judgment rendered by the district court of Pierce county in this action against the signers of the second bond.

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To reverse the judgment of the district court against the signers of Korth's first bond, the sureties, in due time, filed in this court a petition in error, and this judgment is the only one before us for review.

The county has submitted a motion in this court to dismiss the petition in error of the sureties. The only ground of which motion that we deem it necessary to notice is that all the parties to the judgment against the sureties in the district court are not parties to the petition in error filed here for its reversal. The only defendant in error is the county of Pierce. The plaintiffs in error are the signers only of the first bond. The contention is that Carl Korth and all the signers of the second bond should be made parties plaintiffs in error or parties defendant to the proceeding instituted in this court by the sureties to reverse the judgment of the district court against them. If the judgment which the sureties seek to reverse here was a joint and several judgment, not only against them, but against Carl Korth and the signers of his second bond as well, then the motion of the county would be well taken. The rule of this court is: "All the parties to a joint judgment are necessary parties to a petition in error filed here by one of their number to reverse it." (*Wolf v. Murphy*, 21 Neb., 472; *Curten v. Atkinson*, 29 Neb., 612; *Consaul v. Sheldon*, 35 Neb., 247.) In *Andres v. Kridler*, 42 Neb., 784, the rule was again under consideration, and the court held: "Where only a part of several defendants, against all of whom a joint judgment has been rendered, file a petition in error for the purpose of procuring the vacation of such judgment, and the judgment defendants, who have not joined in the petition in error, are not made defendants in error, there exists such defect of parties that the judgment complained of cannot be reviewed." The question was again before the court in *Polk v. Covell*, 43 Neb., 884, and it was held: "In order to secure a review of a joint judgment by petition in error all persons inter-

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ested must be made parties to the proceedings as plaintiffs or defendants." These cases then amount to this, that where it is sought by error proceedings in this court to review the judgment of a district court all the parties made jointly liable by such judgment must be before this court; but the motion here does not fall within this rule. Korth was not a party to the judgment which we are asked to review, nor were any of the sureties or signers of Korth's second bond parties to this judgment. The only parties made liable by the judgment we are reviewing are the parties who signed Korth's first bond, namely, plaintiffs in error, the sureties. The motion must, therefore, be overruled.

This brings us to a consideration of the real merits of this case, namely, the correctness of the ruling of the district court in refusing the plaintiffs in error a jury for the trial of the issues of fact made by the pleadings. These issues were whether the treasurer was a defaulter at the expiration of his first term of office, and if so, the amount of such defalcation. Section 6 of the bill of rights provides that the right of trial by jury shall remain inviolate. This is a constitutional guaranty that the right of trial by jury shall remain as it did prior to the adoption of the constitution of 1875. Without going into a history of this provision it is sufficient to say that at the time of the adoption of the present constitution the right of trial by jury was guaranteed by the constitution of the state to its citizens substantially as the right existed at common law. By section 280 of the Code of Civil Procedure it is provided that issues of fact arising in actions for the recovery of money shall be tried by a jury. The spirit of the constitution and laws of this state seems to be this, that if an issue of fact arise in an action equitable in its nature such issue of fact is triable to the court; but if the issue of fact arise in a purely legal action then the issue of fact is triable to a jury. The action at bar seems

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to us to be one purely legal in its nature. It is an action upon a contract for the payment of money only unincumbered by any collateral agreements, contracts, or securities whatever. The test of equity jurisdiction is the absence of an adequate remedy at law. (*Welton v. Dickson*, 38 Neb., 767; *Watson v. Sutherland*, 72 U. S., 74.)

In the petition filed in this case by the county two reasons are assigned for the interference of a court of equity. The first is that the defaulting treasurer is insolvent; but insolvency alone will not deprive a citizen when sued upon an ordinary contract for the payment of money or upon an official bond which he has executed agreeing to account for and pay over money which he may collect for the municipal corporation of which he is an officer, of his constitutional right to have the fact as to whether he has violated his contract in not making the payment at the time, place, and in the amount promised; or whether, as such officer of such municipal corporation, he has collected funds of the public and converted them to his own use. The second reason assigned for the interference of a court of equity is that the county is unable to determine from the books and records kept by this treasurer whether his defalcation occurred during his first or second term of office, and that the county is not in possession of any evidence by which it can show when such defalcation occurred. Of this averment of the petition we have this to say: (1.) That these plaintiffs are liable, and liable only, for whatever defalcation this treasurer may have committed during the existence of his first term of office. And if it be true that the county has no evidence to show that the defalcation complained of did occur during said term, we do not see how a court of equity or a referee would be any better able to find the fact that the defalcation did then occur than would a jury. Even a court of equity or a referee must find conclusions of fact from evidence. Nor is there any averment in the petition that the county will be able to

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produce evidence to show that the defalcation complained of occurred during the treasurer's first term before the chancellor, if the equity court takes jurisdiction of the case. (2.) By the statutes of this state the counties thereof are made bodies politic; that is, political corporations. The control and management of the affairs of these counties is entrusted to a board of supervisors or county commissioners. These county boards are invested with authority, and it is their duty to examine the accounts and books of the county treasurer at stated intervals. The law prescribes what books and what kind of books the treasurer shall keep, and it was the duty of the county authorities of this county to see that the treasurer kept such books and kept them in the manner provided by law, and in the event of his failure or refusal to do so, impeach him and oust him from office. Again, where a county treasurer is elected to succeed himself the county authorities are prohibited from approving his official bond for his second term until he has fully accounted for all the moneys collected by him during his first term of office. If the county authorities of Pierce county had performed their duties, there need have been no very great uncertainty as to the time when the defalcation occurred. If they had at stated times during the treasurer's first term of office examined the treasurer's books and vouchers and compelled him to produce and account for the money which such books showed was in his hands, they would have known of the defalcation very soon after it occurred; and when this treasurer's first term of office expired, before he qualified for the second term, if the county authorities had obeyed the law and performed their duties and had examined the treasurer's books and his vouchers, they could have ascertained what moneys were in his hands at that time as treasurer, as they had the authority to require him to produce this money; that is, to satisfy them that he had this money on hand, not that he had drafts, bills of exchange, and promissory notes for it, or that he had an

amount on deposit in a bank equivalent to the amount which the books showed he had in his hands as treasurer, but the lawful money of the United States in specie. The county cannot be permitted to make use of the existence of a state of facts brought about by the negligence, the laches, and the violations of duty of its county board to deprive the sureties on their treasurer's bond of their constitutional right to a jury trial. Had the county authorities of this county examined the accounts of its treasurer and settled with him at the expiration of his first term of office, as the law required them to do, and the treasurer had at that time in his possession the amount of money which the settlement and accounting disclosed he should have in his hands as such treasurer, such settlement would have afforded in any suit, either at law or in equity, a very strong presumption that the defalcation occurred subsequently to such settlement. In the absence, then, of all authority on the subject, we have not the slightest doubt but this action is a legal one, and that these sureties were entitled to a jury trial of the issues of fact therein.

A legal action cannot be referred except by consent of parties, as neither party can be deprived of the right to a trial by a jury in such cases, and in actions involving an account between the parties it is only in cases of an equitable nature that a reference can be ordered without consent of the parties. (*Mills v. Miller*, 3 Neb., 87. See, also, *Lamaster v. Scofield*, 5 Neb., 148.) In this last case it was held: "Under the Code, discovery has ceased to be one of the objects sought in a court of equity. Jurisdiction, therefore, in cases of mutual accounts between parties, cannot be maintained on that ground, and is restricted to cases which have their origin in intimate or confidential relations of the parties, and does not extend to ordinary cases of mutual accounts between creditor and debtor." (See, also, *Hosford v. Stone*, 6 Neb., 378; *Kinkaid v. Hiatt*, 24 Neb., 562.)

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Oglesby's Sureties v. State, 11 S. W. Rep. [Tex.], 873, was a case very much like the one under consideration, and it was there held: "In an action against two distinct sets of sureties on the bonds of a collecting officer given for his first and second terms, respectively, allegations in the petition that plaintiff is unable to determine whether the defalcations complained of occurred during the first or during the second term, and that, therefore, all the sureties are joined that their equities may be adjusted and a multiplicity of suits avoided, are demurrable. The liability of each set of sureties is purely legal, and the facts alleged present no ground for equitable jurisdiction." We think this case is a correct enunciation of the law. We are aware that a contrary conclusion was reached in *State v. Churchill*, 3 S. W. Rep. [Ark.], 352, but we do not feel justified in adopting the conclusion reached in that case in view of the provisions of our constitution and statutes.

We conclude, therefore, that the learned district court erred in refusing the plaintiffs in error a jury for the trial of the issues of fact made by the pleadings in this case, for which its judgment is reversed and the cause remanded with instructions to permit the county, if it so desires, to file an amended petition at law against the plaintiffs in error upon paying all the costs of this action up to that time.

REVERSED AND REMANDED.

CENTRAL CITY BANK V. W. H. C. RICE.

FILED APRIL 4, 1895. No. 6338.

1. Verdict for Defendant in Action on Notes. Evidence examined, and held sufficient to support the verdict.
2. Review of Ruling on Motion for New Trial: SUFFICIENCY OF EVIDENCE. The discretion of a trial judge to set a verdict

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62	162

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aside because not sustained by the evidence is broader than that of an appellate court. It will be presumed that the trial judge, in overruling a motion for a new trial grounded upon the insufficiency of the evidence, has exercised his deliberate judgment thereon, and his ruling will not be interfered with unless clearly wrong. (*Davis v. Hilbourn*, 41 Neb., 35; *Dewey v. Chicago & N. W. R. Co.*, 31 Ia., 373.)

3. **Negotiable Instruments: DENIAL OF PLAINTIFF'S OWNERSHIP.** In an action on a promissory note by an alleged indorsee thereof a denial of the indorsement and of plaintiff's ownership is a good defense.
4. **Pleading: AMENDMENTS: REVIEW.** The permitting or refusing of leave to amend pleadings rests within the discretion of the trial court, and its action will not be reversed except for abuse of discretion and on its being made to appear that the party complaining was prejudiced. Prejudice will not in such case be presumed. *Omaha & R. V. R. Co. v. Moschel*, 38 Neb., 281, followed.
5. **Trial: ADMISSION OF EVIDENCE.** Certain rulings of the trial court on the admission of evidence examined, and *held* not erroneous.

ERROR from the district court of Merrick county. Tried below before MARSHALL, J.

W. T. Thompson, for plaintiff in error.

J. W. Sparks and *W. R. Watson*, *contra*.

IRVINE, C.

This action was brought by the bank on ten promissory notes for \$25 each, made by Rice to the order of a corporation styled the Opera House Company, and alleged to have been indorsed and transferred to the bank. The answer denies the transfer, denies that the bank is the owner of the notes, and then pleads specifically a number of facts which practically, for the most part, merely support the denials referred to. There was a verdict for the defendant, the judgment whereon the bank by this proceeding seeks to reverse.

The principal contention is with regard to the sufficiency of the evidence. The evidence on behalf of the plaintiff tended to show that the notes sued upon were given to the Opera House Company in payment for stock issued to Rice; that a judgment had been rendered against the Opera House Company, and for the purpose of raising funds to satisfy this judgment, and for other purposes, certain stockholders of the Opera House Company, including Rice, made their notes to a banking partnership, having the same name as the plaintiff, for \$1,300; and that the Opera House Company pledged as security to this note the notes sued upon, together with a number of others of like character. When the \$1,300 note came due a portion thereof was paid from the proceeds of the collateral notes and the remainder thereof was paid by an absolute sale of the unpaid collateral notes to the bank, the purchase money being applied to the discharge of the \$1,300 note. After this transaction the plaintiff bank was incorporated and purchased all the assets of the banking partnership, including the notes in question. The evidence on the part of the defendant tended to show that one F. M. Persinger was treasurer of the Opera House Company, and as such officer had possession of the notes; that he was also a partner in the bank prior to the incorporation; that some of these stock notes had been lawfully pledged prior to the transaction in question; that one N. R. Persinger, also a partner in the bank and a stockholder in the Opera House Company, was in arrears to the latter for his stock payments, and that an arrangement was made whereby the bank should furnish the money to satisfy his delinquency, taking certain of these stock notes as collateral, N. R. Persinger to indemnify the makers of the notes against loss on this account; that Metcalf, the president, and the defendant, the secretary of the Opera House Company, indorsed certain notes for the purpose of carrying out this agreement, but Persinger failed to provide the indemnity and the agree-

ment was never fulfilled. The evidence also tends to show that while Metcalf's indorsement of the notes here sued on was genuine, Rice, as secretary, never did indorse these particular notes, and that the indorsement thereon purporting to be his is a forgery. Defendant's evidence also tends to show in regard to the \$1,300 note that a joint note of certain stockholders was to be made for that amount, and in addition thereto each of the makers was to deposit as collateral his several notes in proportion to his stock. The minutes of the Opera House Company corroborate this theory and disclose no authority for pledging the stock notes as security to the loan. Rice testifies that he paid the individual note thus pledged. We think in this condition of the evidence the verdict is supported. There is certainly enough to warrant the jury in finding that the Opera House Company never authorized a transfer of the notes; that the indorsement of the secretary was a forgery, and that the pledge was made by F. M. Persinger without authority in that behalf. It is disclosed by the record that this verdict was the result of a second trial of the case, and that a former verdict of the same character had been set aside by the trial judge. Whether the evidence was the same we have no means of determining. On the one hand it is argued that the determination of the trial judge in overruling the motion for a new trial directed against this verdict lends weight thereto, while on the other hand we understand the argument to be that the setting aside of the former verdict has weight the other way, and that in sustaining the present verdict the trial judge did so merely to afford a more expeditious hearing in this court. We cannot adopt the latter view. The authority reposed in the trial court to set aside a verdict because not supported by sufficient evidence is an authority to be exercised judicially, and we must presume that the trial judge did so exercise it and that his action in overruling the motion for a new trial was the result of his delib-

erate judgment upon the sufficiency of the evidence. Where the evidence is conflicting and the *nisi prius* court has overruled the motion for a new trial grounded upon the insufficiency of the evidence, this court will not interfere. "And this because, first, the jury have found the verdict and given credit to the witnesses on the one side of the conflict; second, the judge, who also heard the testimony from the mouths of the witnesses and weighed the same in the balance of his more cultured and accurate legal judgment, has, by overruling the motion, given his approval and indorsement to the verdict; and third, this court can never have the benefit of observing the conduct and deportment of the witnesses while testifying, nor even the peculiarity of their expression. * * * The rule ought not and does not have any application whatever to the *nisi prius* courts. * * * Whenever it appears that the jury have, from any cause, failed to respond truly to the real merits of the controversy, they have failed to do their duty and the verdict ought to be set aside and a new trial granted," the trial judges, however, being careful not to invade the legitimate province of the jury. (*Dewey v. Chicago & N. W. R. Co.*, 31 Ia., 373; *Davis v. Hilbourn*, 41 Neb., 35.)

It is argued that the defendant is not in any position to litigate the respective rights of the bank and the opera house company. This is true, but his defense is not based on such relations. The bank, as part of its case, must show that it is the lawful holder of the notes. Unless the bank is the owner of these notes, a judgment thereon would be no defense to the defendant in an action brought against him by the Opera House Company, or the real owner of the same notes. It is very clear that the answer sets up a good defense. (*Schroeder v. Nielson*, 39 Neb., 335.)

On the trial the defendant was given leave to amend by interlineation his answer so as to deny the genuineness of the indorsements on the notes. The granting of this leave is assigned as error. The permitting or refusing of amend-

ments rests within the discretion of the trial court, and this court will not review the action of the trial court in that regard unless it be made to appear that there was an abuse of discretion to the prejudice of the party complaining. Prejudice will not be presumed. (*Omaha & R. V. R. Co. v. Moschel*, 38 Neb., 281.) It was not made to appear that this amendment prejudiced the plaintiff. The plaintiff did not even ask a postponement in order to obtain an opportunity of meeting the new issue. Error therefore does not appear.

Certain assignments of error relate to the evidence. N. R. Persinger was called by the plaintiff to identify the notes sued on, and testified that they had been transferred by the banking partnership to the plaintiff bank. On cross-examination he was asked, "Is the signature on the face of those notes and the signature to the indorsements of them the same? Look at each one carefully." This was objected to as not proper cross-examination and the overruling of the objection is assigned as error. While the genuineness of the indorsements by the Opera House Company to the banking partnership was not within the scope of the direct examination, we think it was proper in cross-examination as to the identity of the notes, which was the subject-matter of the direct examination, to call attention to the peculiarities which might affect the witness' judgment as to the identity of the papers.

Error is also assigned because the defendant was permitted to testify that he never indorsed his name to the notes. It is argued that his indorsement was not necessary to transfer these notes to the bank; but conceding that this is true, still, if he had indorsed them for the purpose of transferring them to the bank he could not now maintain a defense on his own behalf based on his want of authority so to do. This evidence was material at least for the purpose of avoiding the estoppel. The defendant was also permitted to testify that he had not, as secretary of the com-

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pany or as a stockholder, authorized Persinger to turn over the notes to the bank. This was admissible on the same ground as the last question. He was further asked whether the Opera House Company had, by resolution, authorized the transfer. It is argued that this question was misleading because authority might be given otherwise than by resolution, but it was proper, by proof, to negative *seriatim* and not collectively all the methods of transfer, and while the contents of a resolution might not be proved by parol, it is always permissible in such cases to inquire of a witness as to the existence of a written instrument as preliminary to its production, proof, or identification.

A page of the treasurer's book was offered in evidence, but two items thereon were excluded on objection of the defendant. The exclusion of these items is assigned as error. No offer was made disclosing the materiality of these items, and while, perhaps, the whole page should have gone in evidence, if any portion was admitted, still, as counsel did not point out in what respect the excluded items were material, and as we cannot conceive from an examination of the items themselves how they were material, the error, if error it was, was without prejudice.

JUDGMENT AFFIRMED.

POST, J., not sitting.

W. R. SNYDER ET AL. V. F. I. DANGLER.

FILED APRIL 4, 1895. No. 6125.

1. **Fraudulent Conveyances: SALES: CHANGE OF POSSESSION.** Where a sale of goods is not followed by an actual and continued change of possession, the presumption is that the sale was made with the intention of hindering, delaying, or defrauding creditors of the vendor, and in a contest with such creditors

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the burden is on the vendee to prove that he purchased in good faith and for value.

2. ———: ———: ———: BURDEN OF PROOF. Therefore, where there was evidence in a contest between a vendee and creditors of the vendor tending to show that there had been no change of possession, it was error to instruct the jury that the burden of proof was on the creditors to establish fraud.
3. ———. A conveyance of goods for the purpose, on the part of the vendor known to the vendee, of hindering, delaying, or defrauding creditors is void as to such creditors, even though the vendor be not insolvent.
4. ———. All persons who were creditors of the vendor at any time while the goods remained in his possession or under his control are within the protection of the statute against fraudulent conveyances.

ERROR from the district court of Adams county. Tried below before BEALL, J.

B. F. Smith, for plaintiffs in error, cited: *Claffin v. Rosenberg*, 42 Mo., 439; *Mills v. Thompson*, 72 Mo., 367; *Wilhoite v. Udell*, 9 So. Rep [Ala.], 550; *Runge v. Brown*, 23 Neb., 817; *Gilbert v. Merriam & Roberson Saddlery Co.*, 26 Neb., 194; *Bowie v. Spaid*, 26 Neb., 635.

Papps & Stevens, contra, cited: *Clark v. White*, 12 Pet. [U. S.], 178; *Conord v. Nicoll*, 4 Pet. [U. S.], 291; *Levan's Appeal*, 112 Pa. St., 294; *Dodge v. Masten*, 17 Fed. Rep., 660; *Densmore v. Tomer*, 11 Neb., 118; *Clemens v. Brillhart*, 17 Neb., 238; *Ahlman v. Meyer*, 19 Neb., 63; *Stephenson v. Ravencroft*, 25 Neb., 678.

IRVINE, C.

Dangler brought this action against Snyder for the conversion of a stock of merchandise. Snyder answered alleging the recovery by Myers & Herzog, Dolan, Drewery & Co., and Burnham, Bauer & Co. of judgments against Hattie R. Hollingsworth; and that Snyder, as constable, had levied executions issued on these judgments on the prop-

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erty in question as the property of Hattie R. Hollingsworth and had sold the property under such executions. He denied that Dangler was the owner, and alleged that Hattie Hollingsworth was the owner at the time of the levy. Afterwards the judgment creditors were admitted to defend, and they answered in the same manner, except that they specially pleaded that the claim of the plaintiff was made for the purpose of hindering, delaying, and cheating the creditors of Hollingsworth. The reply was a general denial. There was a verdict and judgment for the plaintiff. The only assignments calling for notice relate to the instructions.

The theory of the plaintiff was that he had purchased the goods of Hollingsworth in good faith and for value. The theory of the defendants was that the pretended purchase was made for the purpose of defrauding Hollingsworth's creditors. There was evidence tending to show that prior to the sale relied upon by plaintiff, plaintiff had been in charge of the goods as the agent of Hollingsworth; that Hollingsworth's name was on a sign over the door; that after the purchase by plaintiff he remained in possession apparently in the same manner as before; that the sign was not removed or changed and that there was no visible or actual change in possession. On this state of the evidence the court, after stating the issues, instructed the jury as follows:

"You are instructed by the court that it is incumbent upon the plaintiff to prove by a fair preponderance of the evidence that he was the owner of the goods described in this case at the time said goods were levied upon by the said Snyder, and it is incumbent upon the plaintiff to prove by a fair preponderance of the facts all of the material allegations made in his petition.

"The court further instructs the jury that there being a general denial filed to the answer of the defendant in this case, that it is incumbent upon the defendants in this case

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to show by a fair preponderance of the evidence that the purchase of and the transfer of the goods in question by H. R. Hollingsworth to the plaintiff was made by the said H. R. Hollingsworth with the intention of hindering, delaying, and defrauding her creditors, and that the plaintiff was cognizant of such intention, and had notice and knowledge thereof.

"2. The court instructs the jury in this case that the law does not prevent a man from selling or in anywise disposing of his property, although he may be insolvent, and the mere fact of the transfer may tend to delay or hinder his creditors will not, alone, render the same fraudulent. The power of the debtor to sell his property implies a corresponding right of another to purchase, and insolvency does not vitiate the transfer, and when a transfer is made for a valuable consideration there must not only be a fraudulent intention on the part of the debtor, but there must also be a participation in that intention on the part of the purchaser. And if you find in this case that at the time of the sale of the goods described in the petition to the plaintiff by H. R. Hollingsworth that she was insolvent, the mere insolvency of the said H. R. Hollingsworth at that time will not render the sale fraudulent, unless you find that the sale was made by H. R. Hollingsworth with the intention to defraud, hinder, or delay her creditors, and that the plaintiff in this action, at the time he purchased said goods, had notice or knowledge of said indebtedness and insolvency and intention; and unless you so find, your finding will be for the plaintiff in this action showing the amount of his judgment and what the evidence shows the goods in the petition were worth at the time they were taken, with seven per cent interest thereon from the time of taking the same, if you find they were taken by the defendant as charged."

"5. The court further instructs the jury in this case that the burden of proving fraud is upon the defendants in

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this case, and that fraud is never presumed, and that unless the defendants by a fair preponderance of the evidence establish the fact that H. R. Hollingsworth sold the property described in the petition to the plaintiff with the intention of hindering, delaying, and defrauding her creditors, and that the plaintiff had knowledge or notice of such facts that would put a man of ordinary intelligence upon inquiry that would lead to notice, you will find for the plaintiff.

“Instruction No. 1, asked for by the defendants in the case below. ‘The court instructs the jury that if you find that H. R. Hollingsworth was the owner of the goods in question, and that F. I. Dangler was in charge of them from April 1, 1891, to the 17th day of August, 1891, as her agent, and the jury further finds that after the 17th day of August, 1891, until the goods were taken by the constable September 7, 1891, the goods remained in the same place and there was no change of possession by any acts that would give notice to outsiders of such change, such as a change of the sign and visible acts of ownership, other than that which was exercised before Dangler claimed the goods, and the jury finds that Dangler had notice of the existence of debts against Hattie R. Hollingsworth, then Dangler was not a *bona fide* purchaser without notice, and he cannot recover against the *bona fide* creditors of Hattie R. Hollingsworth, who had levied executions upon the goods.’”

“Modified by the court: ‘Unless he, Dangler, proves that he paid a valuable consideration for said stock of goods, and that he purchased it in good faith without intent to hinder and delay the creditors in the collection of their debts.’”

All these instructions were requested by the parties and no other material instructions were given. There could be no doubt that instructions 1, 2, and 5, standing alone, would be erroneous as applied to this case, although they may be

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correct statements of the law in the abstract. The burden was in the first place on the plaintiff to establish his ownership of the goods as the jury was told in the first instruction; but this burden was satisfied by proving a sale in fact, and then, if an actual and continued change in possession had been established, the burden would devolve upon the defendants, as stated elsewhere in instructions 1, 2, and 5, to prove a fraudulent intent and a participation therein by plaintiff. But there being evidence that no change in possession had taken place, if the jury found that such was the fact, the burden would remain upon the plaintiff to establish that he purchased for value and in good faith. (Compiled Statutes, ch. 32, sec. 11; *Robinson v. Uhl*, 6 Neb., 238; *Densmore v. Tomer*, 11 Neb., 118; *Densmore v. Tomer*, 14 Neb., 392.) In view of the evidence as to possession the instructions referred to which were requested by the plaintiff were, therefore, misleading, because the jury would infer that, regardless of the facts relating to possession, the burden was on the defendants to establish fraud. The modification of the instruction asked by the defendants we do not think cured the error. This modification implies a correct statement as to the burden of proof, but only by the use of the language "unless he, Dangler, proves," etc., whereas the first instruction and the fifth requested by the plaintiff stated clearly that fraud must be established by a fair preponderance of the evidence. The court nowhere distinguished the rules in regard to the burden of proof as depending on the fact of possession, and the instructions when taken as a whole, instead of helping one another out and comprising a correct statement of the law, were confusing and misleading. The case illustrates the fact that the trial judge should assume the duty of himself preparing instructions covering the law of the case and not depend entirely upon instructions requested by the parties, which will seldom alone afford a systematic and logical statement of the law.

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The defendant in error seeks to avoid the effect of the instructions by urging that the plaintiff was in any view entitled to a verdict, because it was not shown that Hollingsworth was insolvent. This is immaterial. The statute makes all conveyances of goods or things in action void as against creditors when made with the intent of hindering, delaying, or defrauding creditors. (Compiled Statutes, ch. 32, sec. 17.) It is the intent with which the conveyance is made, and not the fact that it necessarily operates to defraud creditors, which avoids it.

It is also urged that the defendants were not creditors within the meaning of the statute. The proof shows they were creditors before the sale and during the whole time intervening between the sale and the levy. They were, therefore, within the protection of the law. (Compiled Statutes, ch. 32, sec. 12; *Densmore v. Tomer*, 14 Neb., 392.)

REVERSED AND REMANDED.

ARTHUR J. RICHARDSON V. SUSAN F. HALSTEAD.

FILED APRIL 4, 1895. No. 6037.

44	606
56	338
44	606
58	659
44	606
60	792
44	606
61	215
61	254
61	586

1. **Trespassing Animals: DUTY OF DISTRAINOR TO FEED.** The owner of live stock taken up under the herd law by the owner of cultivated lands, on which they are found trespassing, is not, while the stock remains in the possession of the land-owner by virtue of his lien, under obligations to feed, water, or care for such stock. Such obligations devolve upon the lienor.
2. ———: ———: **DEGREE OF CARE.** In keeping the stock and caring therefor the lienor is required to exercise only such care as would be exercised by a person of ordinary prudence under the circumstances.
3. ———: **ARBITRATION: RES ADJUDICATA: DAMAGES TO STOCK.** The authority of arbitrators appointed under the herd law is merely to appraise the damages and costs sustained by the land-

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owner, and, therefore, any right of action which may accrue to the owner of the stock by reason of the former's negligence in keeping the same is not barred by the fact that the statutory arbitration was had and damages assessed and paid.

4. **Instructions.** An instruction which misstates the law is not cured by other instructions stating it correctly, because the jury would be left in doubt as to which paragraph was correct. (*Wasson v. Palmer*, 13 Neb., 376.)

ERROR from the district court of York county. Tried below before WHEELER, J.

Sedgwick & Power, for plaintiff in error.

Harlan & Harlan, contra.

IRVINE, C.

The plaintiff in error seized certain live stock of the defendant in error found trespassing upon his land. Arbitrators were appointed under the herd law, damages assessed and paid. Among the animals so taken up were certain milch cows. Thereafter the defendant in error brought this action against the plaintiff in error, alleging that while the stock was in his possession he had negligently failed to properly feed, water, and care for said stock, and to milk said cows, whereby said stock was damaged. On the issues joined, which need not be here set out, there was a verdict for the defendant in error for \$1, and the plaintiff in error brings the case here because, as he says, he deems the questions of law involved of sufficient general importance to justify his course in spite of the small amount of the judgment.

The only assignments of error discussed in the briefs are directed against the eighth, ninth, and eleventh instructions given by the court. These are as follows:

"8. You are instructed that where stock of any kind is taken up for trespass the owner thereof is not required to look after, feed, water, or care for the same; and if any

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portion thereof are milch cows, the owner is not required to milk the same, but is justified in leaving the feeding, watering, and caring of such stock, and the milking of such cows, to the party taking up the same, and you are instructed that in this case the plaintiff was under no obligations to feed, water, or care for the stock or to milk her cows while in the possession of the defendant.

"9. You are instructed that the fact that the notice was served on plaintiff to pay damages claimed by the defendant by reason of the trespass of the said stock upon the land of defendant, and that damages for the same were paid by the plaintiff, in no way affects the right of the plaintiff to recover such damages from the defendant as you find from the evidence she has sustained."

"11. But if you find by a preponderance of the evidence in this case that the defendant, while in the possession of the stock and milch cows of the plaintiff, failed to so keep, water, or milk the same as to prevent injury resulting therefrom, you should find for the plaintiff in such sum as is equal to the damage that you find from all the evidence the plaintiff has sustained by reason of the failure of the defendant to so keep, feed, water, or milk such stock or milch cows of the defendant."

No particular criticism is made upon the eighth instruction, except as it is connected with the ninth and eleventh. We think the instruction was correct. The herd law (ch. 2, art. 3, Compiled Statutes) gives to owner of cultivated lands a lien for his damages upon animals trespassing thereon, and authorizes him to take the stock into his possession. It follows, therefore, that when the land-owner avails himself of the statute by taking up the stock he is entitled to the possession hereof, and the owner of the stock is not only under no obligations to care for the same while so held, but he has no right to interfere with the possession of the lienor. He has certainly no implied license to enter upon the lands of the lienor for the purpose of caring for

the stock, and if he undertook to do so without express license he would himself become a trespasser.

The ninth instruction is criticised because, as counsel argue, if it is true that proceedings under the herd law in no way affect the right to recover damages in such a case as the present, then one who takes up cattle *damage feasant* becomes a trespasser and the herd law is in effect repealed. We do not think this a just criticism of the instruction. The court was not speaking of the recovery of any damages except such as were sued for in this case, to-wit, those caused by negligence in the keeping of the stock. As applied to such a case it is true that the award and payment of damages to the land-owner under the herd law does not affect any cause of action the owner of the animals may have for such negligence. The only issue before the arbitrators is the amount of damages done by the stock to the cultivated land, and the costs incurred by the owner of the land. This is all the arbitrators may find, and it is only for this that the statute authorizes the entry of judgment. Therefore, for any tort incidentally committed the parties have no remedy under the herd law, but are relegated to the ordinary procedure.

The eleventh instruction we think erroneous. The word "therefrom" renders the instruction somewhat ambiguous, but we think that its clear effect was to convey to the jury the impression that it was the duty of the defendant below, while in possession of the stock, to so keep, feed, water, or milk the same as to prevent injury to the stock, and if he failed to do so he would be liable for any injury resulting from such failure. This makes the lienor an insurer of the safety of the stock against all damages arising from the manner in which it is kept. The lienor's duty is not so great. His position is analogous to that of a bailee, and he is only required in the care of the stock to take such precautions as a person of ordinary prudence would take under similar circumstances. In the fifth and again in the

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seventh instruction the court stated correctly the rule of care required, and defendant in error contends that the eleventh instruction was thereby cured under the rule requiring the whole charge to be construed together. But this is not a case where an instruction incomplete in itself or too general is helped out by further instructions explaining, complementing, or qualifying the first. Here, the rule stated in the eleventh instruction is in conflict with the rule stated in the fifth and in the seventh. In such case it is impossible to say which instruction the jury followed, and the correct instructions do not cure the error. (*Wasson v. Palmer*, 13 Neb., 376; *Ballard v. State*, 19 Neb., 609; *Fitzgerald v. Meyer*, 25 Neb., 77; *McCleneghan v. Omaha & R. V. R. Co.*, 25 Neb., 523; *Robb v. State*, 35 Neb., 285; *First Nat. Bank v. Lowrey*, 36 Neb., 290; *Carson v. Stevens*, 40 Neb., 112.) For the error in the eleventh instruction the judgment must be reversed.

REVERSED AND REMANDED.

A. B. SMITH V. RICHARD J. MASON.

FILED APRIL 5, 1895. No. 6185.

1. **Principal and Surety: PAYMENT BY ONE SURETY: CONTRIBUTION.** Where one of two or more sureties discharges the debt of the principal debtor, by giving his individual note for part of the sum due and money for the residue, which is received by the creditor as payment, and the evidence of the original debt surrendered, such surety is entitled to demand contribution from the other joint sureties, although the new note has not been paid.
2. ———: ———: ———: **AMOUNT OF RECOVERY.** In an action by a surety against one of several co-sureties for contribution, the share to be recovered is controlled by the number of solvent co-sureties. In other words, the insolvent ones are to be ex-

44	610
46	19
44	610
48	264
44	610
49	99
49	254
52	335
54	225
44	610
56	189
56	193
56	475
44	610
159	448
44	610
60	25

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cluded, and the burden must be distributed equally between the sureties who remain solvent.

3. ———: ———: ———: **INSOLVENCY OF PRINCIPAL.** In order to recover contribution it is not necessary to aver and prove the insolvency of the principal debtor.
4. ———: ———: ———. The mere refusal of a surety to accept property from the principal as indemnity will not defeat his right to contribution where he has paid the original debt.
5. ———: ———: ———: **INTEREST.** In an action by one surety against co-sureties for contribution, the plaintiff is entitled to the legal rate of interest on the amount paid by him from the date of such payment.
6. ———: **EXTENSION OF TIME: CONSIDERATION.** An agreement between a creditor and the principal debtor for an extension of the time of payment will not operate to release the surety, where there is no consideration for the agreement.
7. ———: ———: ———. The mere voluntary forbearance on the part of the creditor, enlarging the time of payment, without consideration, or the mere failure to institute an action against the principal when the debt becomes due, will not alone discharge the surety.
8. **Review: ASSIGNMENTS OF ERROR.** In order to obtain a review of the rulings of the trial court on the admission or exclusion of evidence, the particular rulings relied upon for a reversal must be specifically assigned in the petition in error.
9. **Foreign Statutes: PLEADING AND PROOF.** The statutes of another state must be pleaded and proved to be of any avail. In the absence of evidence to the contrary, the laws of the sister-state will be presumed to be the same as our own.

ERROR from the district court of Clay county. Tried below before **HASTINGS, J.**

See opinion for references to authorities upon the propositions discussed.

Thomas Ryan and J. L. Epperson & Sons, for plaintiff in error.

Thomas H. Matters and C. J. Dilworth, contra.

NORVAL, C. J.

On the 21st day of August, 1888, the plaintiff and defendant, together with S. M. Lewis and J. E. Hopper, executed a promissory note as sureties for one William Mason, calling for the sum of \$1,000, drawing interest at seven per cent from date, payable to the order of Robert Frost's Sons, and maturing in two years. The principal debtor being insolvent, and having failed to pay the note at maturity, the plaintiff below, Richard J. Mason, paid the same, and on September 9, 1892, brought this action for contribution against his co-surety, A. B. Smith. The petition alleges the execution and delivery of the note; that Lewis, Hopper, and the plaintiff and defendant signed the same as sureties merely; that the principal on said note, William Mason, had become insolvent at the maturity thereof, and the plaintiff was compelled to, and did, pay said note on the 21st day of August, 1891, and said Lewis and Hopper were insolvent when the note became due, and have been ever since said time; that the plaintiff requested the defendant on September 5, 1892, to pay the sum of \$647.35, as his contributive share of said note, which he refused to do, and that no part of said amount has been paid. The defendant, for answer, admits the execution and delivery of the note as alleged by the plaintiff, denies all other averments of the petition, and alleges that an extension of the time of payment of the note was granted the said William Mason and the plaintiff, without the consent of the defendant. For further answer it is alleged that about the time the note became due the principal signer, William Mason, offered to turn over to the plaintiff property of sufficient value to pay the amount due thereon, to indemnify and save the plaintiff harmless from any loss on account of his having signed said note, but the plaintiff refused to receive or accept the indemnity so offered him and failed to inform the defendant of the fact until after this

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suit was brought. The plaintiff replied, denying all new matter in the answer. There was a verdict for the plaintiff below in the sum of \$714.40, the defendant presented a motion for a new trial, which was overruled by the court, and the plaintiff having entered a remittitur in the sum of \$42.35, judgment was rendered upon the verdict against the defendant in the sum of \$672.05, to review which he has removed the cause to this court by proceedings in error.

It is insisted that the verdict is not sustained by sufficient evidence, for the following reasons:

1. Because the plaintiff has never paid the note.
2. The evidence fails to show the insolvency of the co-sureties, Lewis and Hopper.
3. That there was an extension of the time of payment, without the defendant's consent, which released him from all liability.

We will notice these objections in the order stated. On the question of payment the uncontradicted evidence discloses that on August 21, 1891, the defendant in error paid the payees named in the note about the sum of \$200 in cash, and for the remainder of the debt he executed and delivered to them his individual promissory note. At the same time the original note was surrendered to the defendant in error with this indorsement made thereon by the holders thereof: "One thousand two hundred and ten dollars paid August 21, 1891, by R. J. Mason, in full satisfaction of this note. R. Frost & Sons." The evidence fails to disclose whether the note executed on August 21 has been paid by the maker or not. It is insisted that upon the facts above stated contribution cannot be enforced by the defendant in error against his co-sureties or either of them, since it has not been shown that the second note has been paid. It is well settled that before a surety is entitled to call upon a co-surety for contribution he must have actually paid the debt. (Bispham, Principles of Equity, sec. 330, and cases cited.) But this doctrine does

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not require that the indebtedness should have been paid in money by the surety. If there has been delivered to the holder of the obligation, property which is received in full satisfaction of the demand, it is equivalent to a payment in cash, and will authorize the surety to call upon his co-sureties for reimbursement on the basis of the value of the property so turned over, not exceeding the debt thereby discharged. So, too, the taking of the individual note of the surety for the debt is as much a payment, and authorizes an action against the co-surety, as though the payment had been made in money. We entertain no doubt that the mere taking of a new note will not be regarded as a payment, in the absence of an agreement or understanding that it shall have that effect. The controlling question is whether the note of the defendant in error was taken as an extinguishment of the original debt. The proofs show that it was so received and accepted by R. Frost & Sons, therefore, it was entirely immaterial whether the individual note given by the defendant in error has been paid or not. As between co-sureties, a discharge of their obligation by the acceptance in lieu thereof, by the creditor, of the note of one of the sureties for part of the debt and money for the residue is deemed in law such a payment as will entitle such surety to demand contribution from the other joint sureties, even though the substituted note has not been paid. The rule applicable to the case under consideration is correctly stated in 1 Brandt, Suretyship & Guaranty, sec. 285, thus: "If two co-sureties are bound for a debt, and one of them pays it by giving his note for it, which is accepted by the creditor as payment, the surety thus paying may at once, and before paying the note so given as payment, sue his co-surety for contribution the same as if he had paid the debt in money. In holding this it has been said: 'Where one person is obligated to pay money for the use of another, a payment made in any mode, either property or negotiable paper or securities, if such payment is received as

full satisfaction of the demand, it is equivalent to, and will be treated as, a payment in cash. * * * Where the payment is received as a complete satisfaction, and the debt or obligation is extinguished, it is a matter of no moment to the person to whose use the payment is made whether it is made in money, property, or obligations. The benefit to him is the same, and the obligation to refund should be the same.' " The doctrine of the text is abundantly sustained by numerous decisions, among which are the following: *Witherby v. Mann*, 11 Johns. [N.Y.], 518; *Stone v. Porter*, 4 Dana [Ky.], 207; *Robertson v. Maxcey*, 6 Dana, [Ky.], 101; *Cornwall v. Gould*, 4 Pick. [Mass.], 444; *Stubbins v. Mitchell*, 82 Ky., 536; *Atkinson v. Stewart*, 2 B. Mon. [Ky.], 348; *Ralston v. Wood*, 15 Ill., 159; *Brisendine v. Martin*, 1 Ired. Law [N. Car.], 286; *Pinkston v. Taliaferro*, 9 Ala., 547; *Anthony v. Percifull*, 8 Ark. [3 Eng.], 494; *White v. Carlton*, 52 Ind., 371; *Keller v. Boatman*, 49 Ind., 104.

The case of *Bell v. Boyd*, 76 Tex., 133, cited in the brief of plaintiff in error, does not conflict with the rule above stated. In that case a principal and one of several sureties executed their note, which was accepted by the creditor, in payment of the former note. While it was held in that case that the surety upon the new note was not entitled to contribution from the sureties upon the original note, the court recognize the doctrine that, where one of several sureties discharges the original obligation by his individual note, he is in a position to recover contribution from his co-sureties. We find no fault with the decision referred to. There was no payment of the original indebtedness, but merely a change in the form of the contract by the principal and one of the sureties to the first note, giving a new obligation. This had the effect to release and discharge the sureties who did not sign the last note from their obligation to the creditor, as well as from contribution to their co-surety. Ordinarily, where one of sev-

eral sureties, who are equally bound, pays the debt, he is entitled to recover as contribution from the solvent co-sureties a *pro rata* share of the amount so paid, with interest. There are some cases which hold that in an action for contribution the question of solvency or insolvency of the co-sureties is not material, but that the one paying the debt is entitled to recover contribution without regard to the insolvency of any of them. The better and the more equitable rule, one supported by the weight of authority, and which we think should obtain, is that contribution must be based upon the number of solvent co-sureties. In other words, the insolvent ones are to be excluded, and the burden must be distributed equally between those who are solvent. (*Breckinridge v. Taylor*, 5 Dana [Ky.], 110; *Bosley v. Taylor*, 5 Dana [Ky.], 157; *Morrison v. Poyntz*, 7 Dana [Ky.], 307; *Henderson v. McDuffee* 5 N. H., 38; *Broasman v. Paige*, 11 N. H., 431; *Burroughs v. Lott*, 19 Cal., 125; *Acers v. Curtis*, 68 Tex., 423; *Liddell v. Wiswell*, 59 Vt., 365; *Young v. Clark*, 2 Ala., 264; *Young v. Lyons*, 8 Gill [Md.], 162; *Gross v. Davis*, 87 Tenn., 226.)

As regards the insolvency of the co-sureties, Lewis and Hopper, the evidence in the bill of exceptions is all one way, and shows that they are married men, and while they own some little property, it is exempt, and that nothing could be collected from either upon execution. We think the evidence fully and clearly established their insolvency. The proofs tend to show that William Mason, the principal maker of the note, is insolvent, and payment cannot be obtained from him. Whether sufficient to establish his insolvency, is not important. According to the weight of authority, the right of the surety to recover contribution from a co-surety in no manner depends upon the insolvency of the principal debtor, although the decisions upon the subject are not harmonious. (*Roberts v. Adams*, 6 Porter [Ala.], 361; *Buckner v. Stewart*, 34 Ala., 529; *Sloo v.*

Pool, 15 Ill., 47; *Rankin v. Collins*, 50 Ind., 158; *Judah v. Mieuire*, 5 Blackf. [Ind.], 171; 1 Brandt, Suretyship, sec. 290.)

It is argued that the defendant in error was released from all liability by an extension of the time of payment of the original indebtedness. This defense is not available for two reasons: First, it is not sufficiently pleaded in the answer. It is there averred that the date of payment of the debt was extended by the creditors without the defendant's consent, but it is not alleged that there was any consideration for such extension. In order that an agreement to extend the time of payment made by the creditor with the principal debtor may operate to release the surety, it must be for a sufficient consideration and without the sureties' consent. (*Burr v. Boyer*, 2 Neb., 265; *Dillon v. Russell*, 5 Neb., 484.) If the consideration for such extension must be proved, and there can be no doubt of it, it must also be pleaded. In the next place, it does not appear from the record that there was any agreement entered into for an extension of the time of payment of the original note, but the evidence shows the contrary to be true. The note matured August 1, 1890, and was not taken up until a year later; but this fact alone did not discharge the sureties. There was but merely a voluntary forbearance on the part of the payees to enforce the collection of the note, without any consideration for the same. The mere failure to bring an action upon the note when it matured did not have the effect to release the sureties. (*Dillon v. Russell*, *supra*; *Sheldon v. Williams*, 11 Neb., 272.)

It is contended that the verdict is contrary to the fourth instruction to the jury given by the court upon its own motion, which was to the effect that if the jury found from the evidence that plaintiff was surety on, and was compelled to pay, the note in controversy, and that his co-sureties, Lewis and Hopper, were solvent, plaintiff was entitled to recover from the defendant a sum equal to one-fourth of

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the amount paid by the plaintiff with seven per cent interest from the time of payment. The judgment being for one-half the sum paid by the plaintiff with interest thereon, it is argued that the jury disregarded the fourth instruction. This could not be so unless there was insufficient evidence before the jury upon which to base a finding that Lewis and Hopper were insolvent. We have already passed upon the proposition adversely to the defendants in another part of the opinion. Both Lewis and Hopper being execution proof, under the rule stated above, and announced in the third paragraph of the charge of the court, the measure of the plaintiff's recovery was one-half of the sum paid by him to discharge the original indebtedness, with interest. The verdict is not contrary to the instructions.

William Mason was called and examined as a witness on behalf of the defendant, and during such examination was asked this question: "State whether anything was said between you and your brother [referring to defendant in error] or on your part in relation to turning out to him, as security or indemnity, this land in payment as far as it would go, on payment of this debt." Plaintiff objected to the question being answered, for incompetency and irrelevancy, which objection was sustained, and an exception taken. Thereupon the defendant made the following offer of proof: "The defendant now offers to show by this witness that on or about the time the plaintiff claims to have taken up the original note, he [witness] had a quarter section of land in Furnas county, Nebraska, of the value of sixteen hundred dollars; that this land he offered to turn out to the plaintiff, his brother, Richard Mason, to indemnify and secure the payment as far as it might go on this obligation, which he claims to have taken up from Frost's sons, and that the tender remained good for some months afterwards; that the plaintiff, Richard Mason, without consulting with Mr. Smith or any of the parties to the note, upon his own motion refused to receive this property

for himself or the sureties, and refused to have anything to do with it whatever, either as an indemnity or payment; that he never gave Mr. Smith and the other co-signers of the note notice of such having been offered or tendered; that Mr. Smith and the other co-signers were ignorant of the fact until after this suit had been brought; that the plaintiff refused to receive it, and wholly failed to notify any of the parties of there being this or any other property that might be applied in this way; that the property and these proceeds have since been disposed of, and was not at the time this suit was brought available for the purpose it was offered. Objected to, as incompetent, immaterial, and irrelevant. Sustained. Exception." There was no error in excluding the foregoing offered testimony. The facts sought to be established thereby did not constitute either full or partial defense to the action. We are not aware of any rule of law which made it the duty of the plaintiff to accept from the principal debtor property as security or indemnity against loss by reason of his having signed the note. Plaintiff in error has cited in his brief cases which sustain the familiar doctrine that, where one surety has accepted security from the principal debtor, all the co-sureties are entitled to the benefit thereof; and if such security is released or given up without the consent of all the joint sureties, the one so releasing cannot obtain contribution against the others. This principle has long been recognized and applied by the courts, but it is no warrant for holding that a surety is bound at his peril to accept indemnity from his principal when offered, and if he fails so to do, that he is not entitled to contribution from his co-sureties. There is another reason why we cannot reverse the judgment for the failure to admit the testimony already mentioned, and that is the question is not sufficiently raised by the petition in error. During the trial numerous rulings adverse to the plaintiff in error were made by the court on the admission and exclusion of testimony, yet not

one of such rulings has been specifically assigned as error in the petition in error, the assignments therein being general and indefinite, such as "the court erred in excluding evidence offered by the defendant" and "the court erred in admitting evidence offered by the plaintiff and objected to by the defendant." Similar assignments have frequently been held too indefinite to be considered. (*Wanzer v. State*, 41 Neb., 238; *Kirkendall v. Davis*, 41 Neb., 285; *Cortel-you v. Maben*, 40 Neb., 512; *Bloedel v. Zimmerman*, 41 Neb., 695; *Wonderlick v. Walker*, 41 Neb., 806; *Wiseman v. Ziegler*, 41 Neb., 886.)

In the brief filed several rulings of the court on the admission and exclusion of testimony relating to the solvency or insolvency of the co-sureties and to the extension of the time of payment of the original note are discussed, but such rulings will not be reviewed or considered by us, because of the insufficiency of the assignments in the petition in error relating thereto.

The eighth assignment in the petition in error is as follows:

"8. The court erred in excluding instructions 1, 2, and 3 requested by the defendant."

The first and second requests were not based upon the evidence in the case, and for that reason they were properly rejected. Had the offered testimony above set out, which was excluded, been admitted, then there would have been evidence before the jury upon which to base these requests to charge. The three requests refused being grouped in the assignment in the petition in error, and as two of them were properly denied, following the repeated decisions of the court, the assignment will not be further considered. Objection is made to the third instruction, which is in the following language: "If you find, gentlemen of the jury, that plaintiff was surety on and paid this note as alleged, and that at the time, and ever since up to September 9, 1892, the other parties on the note besides plaintiff and defendant were

insolvent, then you will find for the plaintiff and assess his damages at one-half the sum you shall find to have been paid by him, with seven per cent interest per annum from the time of payment up to March 21, 1893." The rule laid down in this instruction is in accordance with the views already expressed by us in the opinion, and the authorities cited in support thereof. As we have seen, the insolvency of one or more of several co-sureties does operate to increase the amount the solvent ones are ratably liable to pay in an action for contribution. Further discussion of the point here is wholly unnecessary. It is argued that the instruction is bad in allowing the plaintiff seven per cent interest. It claimed that as the note was made payable in the state of Illinois, it should be construed according to the laws of that state, and, therefore, plaintiff was entitled to only five per cent interest (which is said to be the legal rate in Illinois) instead of seven per cent. Undoubtedly the rate of interest recoverable is the legal rate from the time the plaintiff paid the debt, even though the original note bore a higher rate. (*Bushnell v. Bushnell*, 77 Wis., 435.) In this state the rate of interest allowed by law is seven per cent. The statute of Illinois on the subject of interest is neither pleaded nor proved, hence we must presume that it is the same as the law of this state. (*Ruth v. Lowrey*, 10 Neb., 260; *Lord v. State*, 17 Neb., 526.)

There was an error in the assessment by the jury of the amount of recovery, but the same was cured by the entry of a remittitur by the plaintiff of the sum of \$42.35. The plaintiff paid on August 21, 1891, in discharge of the debt, \$1,200, which, with interest at seven per cent from that time to the date of the trial, March 21, 1893, one year and seven months, amounted to \$1,344.10. One-half of this sum, or \$672.05, was the amount for which judgment was rendered against the defendant below.

It is finally argued that the verdict should have been set aside on the ground of newly discovered evidence.

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That is one of the grounds set up in the motion for a new trial. We are not advised of what the alleged newly discovered evidence consisted, since the evidence adduced on the hearing of the motion is not made a part of the record by the bill of exceptions. Copied into the transcript is an affidavit of one Lewis, which may or may not have been read on the hearing of the motion, but it cannot be considered, because not authenticated in the manner provided by statute.

JUDGMENT AFFIRMED.

ERICK ERICKSON, APPELLEE, V. FIRST NATIONAL
BANK OF OAKLAND ET AL., APPELLANTS.

FILED APRIL 5, 1895. No. 6400.

1. **Alteration of Instruments: RATIFICATION: PLEADING.**
Where a promissory note has been materially altered without the knowledge or consent of the maker, and the holder relies upon a subsequent ratification of the instrument by the maker, such ratification must be pleaded in order to be of any avail.
2. **Estoppel: PLEADING.** The facts constituting an estoppel *in pais* must be pleaded.
3. **Material Alteration of Instruments.** The fraudulent erasure of the name of the original payee of a promissory note, after its execution, by a party to the instrument and the substitution of another, without the consent of the maker, is a material alteration.
4. ———: **VALIDITY OF NOTE.** Such an alteration invalidates the paper as to the maker, who has not assented to, or ratified, the change, even in the hands of a *bona fide* holder for value.
5. ———: ———: **INJUNCTION TO RESTRAIN TRANSFER.** A court of equity has no jurisdiction to enjoin the transfer or collection of such a note, since the maker has an adequate remedy at law.
6. ———: ———: ———. The fact that a party is apprehensive that his witnesses by whom he expects to establish his defense

44	622
52	173
54	109
44	622
50	281
58	451

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against a note may die or move away, is not alone sufficient ground to enjoin the negotiation of the instrument, since the testimony of witnesses may be perpetuated under the provisions of the Code of Civil Procedure.

APPEAL from the district court of Burt county. Heard below before FERGUSON, J.

See opinion for statement of the case.

Sears & Thomas, for appellants:

The alteration of a note in any material part renders it wholly invalid as against a party not consenting thereto, even in the hands of an innocent purchaser. (*Palmer v. Largent*, 5 Neb., 223; *Brown v. Straw*, 6 Neb., 536; *State Savings Bank v. Shaffer*, 9 Neb., 1; *Townsend v. Star Wagon Co.*, 10 Neb., 616; *Davis v. Henry*, 13 Neb., 497; *Barnes v. Van Keuren*, 31 Neb., 165; Randolph, Commercial Paper, sec. 1777.)

The petition contains no allegation and there is no proof of an intention to negotiate the note by indorsement; and since indorsement is necessary to cut off defenses in the hands of third persons, there is no threatened or contemplated act of injury to be restrained and injunction will not lie. (*Britton v. Berry*, 20 Neb., 325; *Camp v. Sturdevant*, 16 Neb., 693; *Doll v. Hollenbeck*, 19 Neb., 639; 3 Randolph, Commercial Paper, 991; *Spangler v. City of Cleveland*, 43 O. St., 526.)

The following cases were also cited by counsel for appellants: *Wise v. Newatney*, 26 Neb., 88; *Dickerson v. Colgrove*, 100 U. S., 578; *Mace v. Heath*, 30 Neb., 620; *May v. Cahn*, 34 Neb., 652.

H. H. Bowes, contra, cited: *Watson v. Sutherland*, 5 Wall. [U. S.], 74; *Irwin v. Lewis*, 50 Miss., 362; *Boyce v. Grundy*, 3 Pet. [U. S.], 210; 10 Am. & Eng. Ency. Law, 794; *Ferguson v. Fisk*, 28 Conn., 501; *Hullhort v. Scharner*, 15 Neb., 62; High, Injunctions [2d ed.], secs. 66, 67, 1375;

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Wilhelmson v. Bentley, 25 Neb., 473 ; *Henry & Coatsworth Co. v. Fisher*, 37 Neb., 207 ; *Warren v. Faut*, 79 Ky., 1.

NORVAL, C. J.

This was an action brought by Erick Erickson in the district court of Burt county to restrain the defendants from the negotiation of a certain promissory note executed by the plaintiff and one Erick Munk, and for the cancellation of said note. From a decree in favor of the plaintiff, the defendants have prosecuted an appeal to this court.

The petition sets up two grounds for relief, namely, that the plaintiff was induced to sign the note as the surety for one Munk by the false and fraudulent representations of the latter, and that the note, after its execution, has been materially altered and changed by erasing the name of the original payee and inserting in lieu thereof the name of the First National Bank of Oakland, without the knowledge and consent of the plaintiff. The answer admits that the defendant bank purchased the note, and denies all other averments in the petition. The trial court found that the note had been materially altered, as alleged by the plaintiff, and its decision was placed upon that ground alone.

The proofs in the record show that one Erick Munk, an oculist of the city of Omaha, prior to the month of December, 1892, had made occasional professional visits to Oakland, and on the 2d day of said month he called upon the plaintiff in Oakland and induced him to sign a note as surety in the sum of \$1,500, due in six months, and upon the representation of said Munk that he was about to purchase the half interest in the business of one Smith, an oculist and aurist of either Des Moines, Iowa, or Cincinnati, Ohio, and that the note was to be used for that purpose. The note was executed in blank as to the payee, it being agreed that Smith's name should be inserted as the payee when his initials should be ascertained, which Mr. Munk subsequently did, by writing in the name of D. B.

Smith. Afterwards, without the knowledge or consent of appellee, Mr. Munk erased the name of D. B. Smith and inserted the name of the First National Bank of Oakland as payee. The note plainly showed that the erasure had been made, and in this condition it was sold by Mr. Munk to the bank, who informed the officers of the bank at the time of what had been done. It also appears that the appellant Bickman, the president of the bank, went to the plaintiff before purchasing the note and inquired if he had signed a note with Mr. Munk for \$1,500. Erickson replied that he had. The note, however, was not shown him, nor did he know at the time that it had been altered. Subsequently the bank notified the plaintiff of the purchase of the note. There was introduced on the trial evidence for the purpose of showing that the plaintiff ratified the alteration of the instrument after the delivery and negotiation, with knowledge of the circumstances attending the change of the payee, also evidence for the purpose of establishing an estoppel against the appellee. It is doubtful whether the evidence upon these questions was sufficient to establish either a ratification or an estoppel. Whether it does or not is wholly immaterial, since no such issues were tendered by the pleadings. The alteration is specifically set out in the answer. Whether the instrument had been materially changed after its execution and delivery was raised by the answer, but not so either as to the question of ratification, or whether the plaintiff had been estopped by his acts from denying the validity of the note in question. If the defendants desired to rely either upon an estoppel or ratification, they should have pleaded in the answer the facts upon which they base such defenses. The doctrine is plain, and needs neither authority nor elaboration to substantiate.

It is urged that a partnership was formed between Erickson and Munk for the purpose of purchasing the business of Mr. Smith, and that by reason thereof Munk

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was authorized to make the alteration. A sufficient answer to this contention is that no partnership is alleged nor proved.

It is conceded, and there is no doubt of it, that the fraudulent erasure of the name of the original payee of a promissory note after its execution by a party to the instrument and the substitution of another without the consent of the maker, is a material alteration. The doctrine is elementary. (*Davis v. Bauer*, 41 O. S., 257; *German Bank v. Dunn*, 62 Mo., 79; *Stoddard v. Penniman*, 108 Mass., 366; *Patch v. Washburn*, 16 Gray [Mass.], 82; *Bell v. Mahin*, 29 N. W. Rep. [Ia.], 331; *Cumberland Bank v. Hall*, 1 Halst. [N. J. Law.], 262.) It is equally as well settled that the material alteration of an instrument invalidates it as to the maker, who has not assented to or ratified the change, even in the hands of a *bona fide* holder for value. (See cases cited above and *Brown v. Straw*, 6 Neb., 536; *Savings Bank v. Shaffer*, 9 Neb., 1; *Davis v. Henry*, 13 Neb., 497; *Hurlbut v. Hall*, 39 Neb., 889.) There can be no question that if suit were brought upon this note against the plaintiff he could avail himself of the defense that he had been discharged by the change of the instrument. The plaintiff having a complete defense at law, is he entitled to relief in equity? We think the answer can only be in the negative. It is a familiar doctrine of equity jurisdiction that the equitable powers of a court may be invoked by a person where the relief afforded at law is not plain or is inadequate, but where the aggrieved party has a full and complete remedy at law, equity will not interfere by injunction. In 10 Am. & Eng. Ency. Law, 792, the rule is correctly summarized in the following language: "If in an action at law the plaintiff can obtain full and adequate relief, a suit in equity for an injunction cannot be maintained by him. Nor can a defendant invoke the aid of a court of equity upon mere legal grounds, because in such case his defense is available at law. To entitle the defendant to relief he must have

an equitable defense which is not available at law, or a good defense at law which, by reason of fraud or accident, without any negligence on his part, he was prevented from using." The text is sustained by numerous authorities cited in the note on the same page. Applying the same rule to the facts in the case at bar, it is obvious that the appellee is in no position to invoke the interposition of a court of equity. His defense against the note is a legal one, not equitable. Full and complete relief can be had at law, therefore a court of equity will not lend its extraordinary aid by injunction. If appellee's defense could be cut off by a transfer of the note to a good-faith purchaser, then we concede he would be entitled to restrain such transfer; but, as we have already seen, the note is absolutely void as to the appellee in whosoever hands it may come, unless there has been a ratification of the change by the appellee, or he has by his own acts and conduct been estopped from denying the validity of the instrument.

In *Hullhorst v. Scharner*, 15 Neb., 62, it is held that a court of equity will enjoin the transfer of a negotiable note obtained by duress and fraud, and in *Wilhelmson v. Bentley*, 25 Neb., 473, it was ruled that where a negotiable note is tainted with the vice of usury and the payee is about to transfer the same to a *bona fide* purchaser, the maker may enjoin such transfer. These cases are not similar to the one at bar, for the reason that the transfer of the notes in the cases mentioned, to an innocent purchaser for value before maturity, would have cut off all the defenses of the makers. In such cases the makers have the undoubted right to take the initiative and enjoin the negotiation of the notes, since the remedy afforded at law was wholly inadequate. Where a negotiable note is about to be transferred before due so as to cut off the defense of the maker, equity, at the suit of the latter, will enjoin the negotiation and order the instrument to be delivered up for cancellation; but otherwise if the note is non-negotiable. (*Perrine v.*

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Striker, 7 Paige Ch. [N. Y.], 598; *Morse v. Hovey*, 9 Paige Ch. [N. Y.], 197.)

No authority has been cited in the briefs, nor after diligent search have we been able to find a single case, which holds that a court of equity will assume jurisdiction to restrain the transfer or collection of a promissory note which has been materially changed after its execution; but there are numerous adjudications laying down the rule that equity will not interfere by injunction. (See *Dorsey v. Monnett*, 20 Atl. Rep. [Md.], 196; *Northern Pacific R. Co. v. Cannon*, 49 Fed. Rep., 517; *Johnson v. Andrews*, 28 Ga., 17; *Globe Mutual Life Ins. Co. v. Reals*, 79 N. Y., 202.)

The *American Water-Works Co. v. Venner*, 18 N. Y. Sup., 379, was an action brought for the purpose, among others, of restraining the defendants from bringing actions upon, or transferring, certain promissory notes given by the plaintiff and payable upon demand, the plaintiff claiming the right to set-off or counter-claim the indebtedness of the defendants to it. It was held that a court of equity will not interfere by injunction, since the defense claimed against the notes was as available at law as in equity.

Grand Chute v. Winegar, 15 Wall. [U. S.], 373, was a suit in equity by a municipal corporation to enjoin the obligee of certain bonds issued by the corporation from prosecuting suits on such bonds and to cancel the same, on the ground that the bonds were issued without authority and in violation of law. Relief was denied because the plaintiff had a perfect and complete defense to the bonds at law.

It was held in *Allerton v. Belden*, 49 N. Y., 373, that the interposition of a court of equity may be sought when equitable relief exists against the note, unless, from the form of the note, the defense is not available at law. That was an action by an accommodation indorser of a note discounted at a usurious rate of interest to annul the note, suit being brought after the maturity of the instrument, it being

alleged in the bill that the makers were insolvent, that plaintiff had requested the holder to bring an action on the note, and that he declined to do so, but intended to delay action until plaintiff's security became worthless and proof of usury impossible. Relief was denied. The court in the opinion say: "The allegations in his complaint disclose a perfect defense at law to any action which might be brought against him on his indorsement, and no fact is stated showing any necessity for the interposition of a court of equity, or entitling the plaintiff to become an actor in the matter. The mere fact that a party has made an agreement, or given a security which is void for usury, is not, and never was, sufficient to entitle him to apply to a court of equity to have the contract annulled. The right to this relief exists only where from the form of the security the defense cannot be made available at law, or where the instrument sought to be avoided is a cloud upon the title to land, or some other necessity for the interposition of a court of equity is shown."

In *Fowler v. Palmer*, 62 N. Y., 533, it is held that an action cannot be maintained to cancel a note and to restrain the bringing of a suit thereon, or for selling or disposing of a promissory note past due, upon the ground that it has been paid.

Town of Venice v. Woodruff, 62 N. Y., 462, was an action to have certain bonds delivered up and canceled, and to restrain the holders from transferring them. The bonds were void even in the hands of a *bona fide* holder. It was decided that the suit could not be maintained. In the opinion of the court it is said: "The cases in which a court of equity exercises its jurisdiction to decree the surrender and cancellation of written instruments are, in general, where the instrument has been obtained by fraud, where a defense exists which would be cognizable only in a court of equity, where the instrument is negotiable, and by a transfer the transferee may acquire rights which the present

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holder does not possess, and where the instrument is a cloud upon the title of the plaintiff to real estate. * * * There must exist some circumstance establishing the necessity of a resort to equity to prevent an injury which might be irreparable, and which equity alone is competent to avert. If the mere fact that a defense exists to a written instrument were sufficient to authorize an application to a court of equity to decree its surrender and cancellation, it is obvious that every controversy in which the claim of either party was evidenced by a writing could be drawn to the equity side of the court, and tried in the mode provided for the trial of equitable actions, instead of being disposed of in the ordinary manner by a jury. Whether, therefore, the question be regarded as one of jurisdiction or of practice, it is established, by the later decisions that some special ground for equitable relief must be shown, and that the mere fact that the instrument ought not to be enforced is insufficient, standing alone, to justify a resort to an equitable action."

Upon principle we are constrained to hold that plaintiff is not entitled to enjoin the transfer or collection of the note.

It is argued that the remedy afforded at law is not so speedy as in equity, since he must wait the pleasure of the holders of the note to bring suit thereon before he can make his defense, and by that time the witnesses to prove the alteration of the instrument may have died or moved away. The fact that the bank has failed to bring an action upon the note and that the defense may be lost by reason of his witnesses being scattered, is insufficient to invoke the powers of equity. We are not aware of any authority which sustains an equitable action upon such ground, and it is not believed that any such can be found. The appellee has ample authority, under the provisions of sections 421 to 427 of the Code of Civil Procedure, to perpetuate the testimony of his witnesses, even before suit is brought

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against him. (*Allerton v. Belden*, *supra*; *Minturn v. Farmers Loan & Trust Co.*, 3 N. Y., 498; *Globe Mutual Life Ins. Co. v. Reals*, 79 N. Y., 203.)

The decree of the district court is reversed and the action dismissed.

REVERSED AND DISMISSED.

B. F. MADSEN V. STATE OF NEBRASKA.

FILED APRIL 5, 1895. No. 5701.

1. **Briefs: WAIVER OF ERROR.** Assignments in a petition in error not argued in the brief of the plaintiff in error will be considered waived.
2. **Criminal Law: ERRORS DURING TRIAL: REVIEW.** In order to obtain a review of alleged errors occurring during the trial the attention of the district court must be challenged to the same in a motion for a new trial, and such alleged errors must be specifically assigned in the petition in error.

ERROR to the district court for Douglas county. Tried below before DAVIS, J.

Ira C. Bachelor and *Silas Cobb*, for plaintiff in error.

George H. Hastings, Attorney General, for the state.

NORVAL, C. J.

An indictment was returned to the district court of Douglas county, charging the plaintiff in error, as a member of the city council of the city of Omaha, with having solicited a bribe. A verdict of guilty was returned, whereupon a motion for a new trial was filed, alleging:

1. The verdict was not sustained by the evidence.
2. The verdict is contrary to law.

44	631
54	71
44	631
159	348
44	631
60	383
44	631
61	89

3. Newly discovered evidence, material to the defendant, which he could not with reasonable diligence have discovered and produced at the trial.

4. Surprise, which ordinary prudence could not have guarded against.

The motion for a new trial was overruled by the court, and the plaintiff in error was sentenced to pay a fine of \$300 and the costs of prosecution.

The petition in error alleges the following errors:

1. In refusing to instruct the jury to return a verdict of not guilty.

2. In giving the first, second, and third instructions, and each of them.

3. The overruling of the motion for a new trial.

4. In permitting testimony to be given before the jury over the objection of the plaintiff in error.

In the brief filed by counsel of plaintiff in error, none of the errors assigned in the petition in error are relied upon for a reversal of the judgment. Again, it will be observed that not one of the grounds contained in the motion for a new trial is embodied in the petition in error. Owing to the peculiar condition of the record indicated above, no proposition is presented to this court for review. It has more than once been held that assignments in a petition in error not argued in the brief will be considered waived. (*Scott v. Chope*, 33 Neb., 41; *Brown v. Dunn*, 38 Neb., 52; *Phenix Ins. Co. v. Reams*, 37 Neb., 423; *Gill v. Lydick*, 40 Neb., 508; *Glaze v. Parcel*, 40 Neb., 732.) It is a well established rule that in order to obtain a review of alleged errors occurring during a trial, the attention of the trial court must be challenged to the same in a motion for a new trial, and such alleged errors must be specifically assigned in the petition in error. (*Tecumseh Town Site Case*, 3 Neb., 267; *McCormick v. Drummatt*, 9 Neb., 384; *Tomer v. Denismore*, 8 Neb., 384; *Shaffer v. Maddox*, 9 Neb., 205; *Birdsall v. Carter*, 11 Neb., 143; *Lowe v. City of Omaha*, 33 Neb.,

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587; *Dillon v. State*, 39 Neb., 92; *Haverly v. Elliott*, 39 Neb., 206.) The judgment is

AFFIRMED.

HORTENSE LOTHROP, APPELLANT, V. ANTON MICHAELSON, APPELLEE.

FILED APRIL 5, 1895. No. 5678.

1. **Ejectment: OCCUPYING CLAIMANTS: REPORT OF APPRAISERS: OBJECTIONS.** Objections to the report of appraisers made under the provisions of the occupying claimants act (ch. 63, Comp. Stats.) should be filed on or before the second day of the term of the district court next after the filing of the appraisement with the clerk of the court, where such report is made and filed in vacation.
2. ———: ———: ———: ———: **REVIEW.** The court may permit such objections to be filed out of time, but it is not reversible error to refuse so to do, where no abuse of discretion is shown.
3. ———: ———: **APPRAISEMENT.** The appraisers appointed under said law are required to make their appraisement from a view of the premises. They have no authority to take the testimony of witnesses.
4. ———: ———: **IMPROVEMENTS: MEASURE OF RECOVERY.** Where an occupying claimant is allowed for valuable and lasting improvements made while in possession, the measure of his recovery is the amount the real estate increased in value by reason of such improvements, and not the cost of making the same. (*Fletcher v. Brown*, 35 Neb., 660.)
5. **Limitation of Actions: TAX LIENS.** The statute of limitations relating to the foreclosure of tax liens is no bar to the recovery of taxes under the provisions of the occupying claimants' act.

APPEAL from the district court of Washington county.
Heard below before SCOTT, J.

Lothrop v. Michaelson.

John Lothrop, for appellant, cited: *O'Dea v. Washington County*, 3 Neb., 121; *Blair v. West Point Mfg. Co.*, 7 Neb., 146; *Fletcher v. Brown*, 35 Neb., 660; *Warren v. Demary*, 33 Neb., 327.

Jesse T. Davis, contra, cited: *Helphrey v. Redick*, 21 Neb., 80.

NORVAL, C. J.

The appellant brought an action of ejectment in the district court of Washington county against the appellee to recover possession of certain real estate situate in said county. The answer denies the title of the plaintiff, and sets up title to the premises in the defendant under a tax deed. The answer further alleges that the defendant, while in possession of the real estate, has paid certain taxes thereon and made valuable and permanent improvements upon the land. The defendant prays, in case a judgment of ejection is entered against him, that he recover under the provisions of the occupying claimants' law for the said improvements and taxes. The case was tried to a jury at the September, 1891, term of the district court, who found the plaintiff to be the owner and entitled to the possession of the premises, and judgment was rendered upon the verdict. Subsequently the parties entered into and filed a written stipulation to the effect that the defendant was an occupying claimant, under the statutes of this state, and that the Honorable Herbert J. Davis, one of the judges of said district court, should make an order for the appointment of appraisers to ascertain the value of the permanent improvements made by the defendant, as well as the rents and profits of said land. The order was made in accordance with the stipulation. The appraisers were appointed, who subsequently made their report in writing. This report was, on motion of the plaintiff, set aside, on account of the failure of the appraisers to take and subscribe the

oath required by statute. An order was issued to summon new appraisers, and the sheriff, in accordance with the command thereof, selected three disinterested freeholders of the county, who, after qualifying, made and filed their report in writing in vacation, and within the time required by the court, with the clerk of the district court, to-wit, on the 2d day of January, 1892. The referees found the value of the premises at the time the defendant went into possession thereof in the sum of \$100, total rents and profits to be the sum of \$90, and the total value of the lasting and valuable improvements made by the defendant while in possession to be \$715.20. The appraisal itemizes the various improvements and the value of each is assessed. The fifth item is as follows: "5. We find that the defendant has grubbed and cleared ten acres of said land, which we assess of the cash value of \$100." On the first day of the February, 1892, term of the district court, to-wit, on February 29, the defendant filed a motion to confirm said report of the appraisers, and on the 2d day of March, 1892, the plaintiff filed a motion to be permitted to file exceptions to said report, which last motion was denied on March 9, and the following decree was entered upon the journal in said cause:

"And now, on this 9th day of March, 1892, this cause came on to be heard upon the report of the appraisers heretofore selected by the sheriff of Washington county, Nebraska, under the order of this court to appraise the valuable and lasting improvements made thereon by the occupying claimant, Anton Michaelson, on the south half of the northeast quarter of section 22, township 18, range 12 east, of the 6th P. M., which report is in words and figures as follows :

* * * * *

"And no objections having been filed to the report of said appraisers that the said report was made within the time required under the order of this court and the

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written instructions given to said appraisers by the court, the court finds that the same is reasonable and fair, and that no injustice has been done either party, except item 5 in said appraisers' report, which is, by consent of the occupying claimant, disallowed and stricken out by the court. The amount found due by the appraisers, after deducting the amount of said premises and the amount stricken out by the court, to be the sum of \$525.20. And thereupon this cause came on further to be heard upon the amount paid as taxes by the occupying claimant, and after hearing the proofs the court finds that the occupying claimant has paid taxes, including interest, at the rate of ten per cent per annum from the dates of the payment of each item of taxes paid by him on said premises, to be the sum of \$370.45.

"It is therefore ordered, adjudged, and decreed by the court that Anton Michaelson, the occupying claimant, have and recover of the said plaintiff Hortense Lothrop the sum of \$525.20 for valuable and lasting improvements, made upon said premises, and the further sum of \$370.45 as taxes, making a total of \$895.65, and that the same is hereby decreed to be a lien upon the above described premises; that the said Hortense Lothrop shall, on or before the 15th day of August, 1892, elect to receive the value of the lands found by the appraisers without the improvements thereon, the same being the sum of \$100, and in case she elects so to do, she shall deposit with the clerk of the district court of Washington county, Nebraska, a general warranty deed of said premises to Anton Michaelson, or tender the same to him in person; or, in case she shall not so elect, then, in that case, she shall pay to the said Anton Michaelson the said sum of \$895.65 so found due for improvements and taxes as aforesaid on or before the 15th day of August, 1892, together with interest thereon at the rate of seven per cent per annum on the sum of \$525.20, at ten per cent per annum on the sum of \$370.45 from the

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first day of this term of court, with costs of suit. And that in case the said plaintiff, Hortense Lothrop, shall fail to elect to pay for the improvements and taxes found due to the occupying claimant, or shall fail to elect or take the appraised value of the lands within the time mentioned in this decree, then, and in that case, the occupying claimant, Anton Michaelson, shall, on or before the 1st day of September, 1892, pay to the said Hortense Lothrop, or to the clerk of the district court of said county, the sum of \$100, so found as the value of said lands without the improvements thereon, for the use and benefit of the said Hortense Lothrop.

“Plaintiff excepts.”

It is insisted that the court erred in overruling plaintiff's motion for leave to file objections to the report of the appraisers. By the provision of section 5 of the act for the relief of occupants and claimants of real estate (ch. 63, Comp. Stats.), objections to an appraisement made under said law are to be filed on or before the second day of the term of court next after the filing of said appraisement with the clerk of the district court, where such report of the appraisers is made in vacation. In the case at bar, as already stated, the appraisement was filed in vacation, and it was not until the third day of the term of court next thereafter that the motion was made for permission to file objections to the same. Such leave to file was, therefore, not made within the time limited by said act. Doubtless, the trial court possessed the power to permit the plaintiff to file objections to the report after the expiration of the period fixed therefor by statute, but its failure so to do is not reversible error, unless it appears that there has been a clear abuse of discretion. This the record before us fails to disclose. The plaintiff's motion for leave to file objections was not accompanied by any showing excusing the delay in the filing thereof, nor did she at that time present to the court her objections to the report. There is copied

into the transcript a paper purporting to be exceptions to the report and certain affidavits which were filed with the clerk of the district court on March 9, but they cannot be considered, for the reason that they have not been embodied in, or made a part of, the bill of exceptions. There is nothing in the record to show that they were ever called to the attention of the trial judge at any time. No abuse of discretion being shown, we cannot reverse the decree for the refusal of the court to permit objections to the appraisement to be filed out of time.

The next contention of appellant is that she was not allowed to appear and produce witnesses before the appraisers before they made their report. There are two answers to this objection: First, it does not appear, except by the affidavits above mentioned, and which are not a part of the record in the case, that any application was made by the appellant, or any one for her, to be allowed to produce and examine witnesses before the appraisers. Again, there is no provision in the occupying claimants' act which authorizes the appraisers to take testimony for the purpose of ascertaining the value of the real estate, or the value of the permanent improvements placed thereon by the occupant of the premises, or the amount of the rents and profits received by him. The proceedings are regulated entirely by statute. The appraisers are required to make their appraisement from a view of the real estate in question. (See sec. 5, ch. 63, Comp. Stats.)

The next point argued is that the value of the land at the time the defendant went into possession, as fixed by the appraisers, is too low. They placed the value at \$100. No evidence was adduced in the district court upon this branch of the case after the appraisement was filed, therefore we are unable to determine whether the market value of the premises was more than the sum returned in the appraisement or not.

It is insisted that an unjust value was placed upon the

improvements by the report, and the case of *Fletcher v. Brown*, 35 Neb., 660, is relied upon to sustain this contention. It was there held, in an opinion by Judge Post, that the occupant of real estate is entitled to recover for the valuable and lasting improvements made by him while in possession under a claim of title, the amount the real estate is increased in value by reason of such improvements, and not the costs of making the same. The rule stated was not violated in the case under consideration. It is the value of the improvements, and not the costs thereof, that the appraisers awarded to the defendant Michaelson.

Lastly, it is said that there was error in allowing the sum of \$370.45 for taxes paid on the land by the defendant, for the reason that the same is barred by the statute of limitations relating to the foreclosure of tax liens. The statute invoked by appellant has no application to proceedings under the occupying claimants' act. By section 1 of said last named act it is provided that the person entitled to the benefits of the provisions shall not be evicted or turned out of possession of the real estate until he has been reimbursed "for all taxes and assessments paid upon said real estate by such claimant, and the persons under whom he claims, with interest thereon, at the same rate of interest as provided by law for delinquent taxes, and for all sums of money paid by such occupant or claimant, or those under whom he claims, to redeem such real estate from any sale or sales for non-payment of taxes previous to receiving actual notice by the commencement of suit on such adverse title or claim by which such eviction or cancellation may be had, unless such occupant or claimant shall refuse to pay the person so setting up and proving an adverse and better title the value of such real estate without improvements made thereon as aforesaid, upon the demand of the successful claimant as hereinafter provided." (Sec. 1, ch. 63, Comp. Stats.) The foregoing provision is unambiguous. There is no room for construction. Under it the court

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could not have done otherwise than allow the defendant the amount of all taxes paid by him upon the land, with interest. The decree is right and is

AFFIRMED.

M. J. BROATCH ET AL. V. R. A. MOORE.

FILED APRIL 5, 1895. No. 5702.

Judgments: ACTION AGAINST FIRM: SUMMONS: SERVICE. An action in the county court was entitled "M. J. B. v. N. & H." In the bill of particulars it was alleged that "said defendants N. O. N. and J. H. are indebted to the plaintiff." Judgment was entered by default against the defendants without naming them. Service was made under the provisions of section 25 of the Code authorizing service against companies or firms not incorporated, the return being as follows: "I served this writ on the within named J. H. at his usual place of business, * * * the within N. O. N. not being found in the county." *Held*, A judgment against the firm of N. & H., and not the individual members thereof.

ERROR from the district court of Buffalo county. Tried below before HAMER, J.

Cavanagh, Thomas & McGilton, for plaintiffs in error.

R. A. Moore, pro se.

POST, J.

This was an equitable proceeding in the district court for Buffalo county by which it was sought to prevent the sale of lot No. 814 in the city of Kearney by the defendant Schars, as sheriff, on execution to satisfy a judgment in favor of his co-defendant, Broatch, and against the firm of Nelson & Hanson. An answer was filed, which need not be noticed further, for reasons which will hereafter appear.

A hearing was had in the district court, where there was a finding for the plaintiff therein and a decree in accordance with the prayer of the petition. A motion for a new trial was made and overruled and the cause removed into this court for review upon the following assignments of error:

“1. The court erred in granting said decree.

“2. Said decree is not sustained by sufficient evidence.”

The paper purporting to be a bill of exceptions was, on motion of the defendant in error, stricken from the record at a former term, thus leaving for determination a single question, viz., Is the decree warranted by the pleadings? The finding being for the defendant in error on substantially all of the issues, our examination will be confined to the petition alone, since it is apparent that if a cause be therein stated for the relief sought, the decree must be affirmed. By it we are informed that on the 25th day of October, 1882, N. O. Nelson and John Hanson, then partners doing business in the firm name of Nelson & Hanson purchased the lot above described and procured a deed to be made therefor to said firm. On the 2d day of February, 1884, Nelson, by deed, in due form conveyed his interest in said lot to Hanson, said firm having been dissolved in the meantime by mutual consent. On the 6th day of the same month Broatch, plaintiff in error, recovered a judgment against the said firm in the county court of Buffalo county on a firm indebtedness for \$335.32 and costs, taxed at \$2.60, and on the 20th day of the same month caused a transcript thereof to be filed with the clerk of the district court for Buffalo county. On the 2d day of September, 1885, the defendant in error purchased said premises from Hanson and one Gillespie, although the interest of the latter does not appear.

The real controversy relates to the character of the judgment, a transcript of which is attached to the petition and made a part thereof. If regarded as a personal judgment against Hanson, it was a lien upon the premises at the time

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defendant in error acquired title through his conveyance from the former, and the petition accordingly failed to state a cause of action. On the other hand, it is conceded that if the judgment is against copartnership merely, it is, for the purpose of this controversy, not a lien, and the petition is not subject to demurrer. Turning to the transcript, we observe the action was entitled "M. J. Broatch v. Nelson & Hanson." In the bill of particulars, which is set out at length, we find the following: "Plaintiff complains of the said N. O. Nelson and John Hanson for that on the 1st day of January, 1884, said defendants were indebted to the plaintiff. * * * Wherefore the plaintiff prays judgment against said defendants," etc. Summons was issued, but for whom does not appear from the record. In the return thereof it is recited as follows: "I served the within writ of summons on the within named John Hanson at the usual place of business by delivering a copy, etc., * * * the within named N. O. Nelson not found in the county." On the return day the following record was made: "Default is this day entered on motion of the attorney for the plaintiff, * * * and it appearing that the defendants are indebted to the plaintiff in the sum of \$335.32, it is considered and adjudged that the plaintiff have judgment against the defendants in the sum of \$335.32 and costs of this action, taxed at \$2.60." The question is certainly not free from doubt, but there is disclosed by the foregoing record one fact which leads us to construe the judgment as against the firm of Nelson & Hanson rather than the individual members thereof. It will be perceived that jurisdiction was acquired therein, if at all, under the provisions of section 25 of the Code, which authorizes service in actions against any company or firm by copy left at the usual place of business of the defendant with a member of said firm, or clerk or general agent thereof, and declares that "executions issued on any judgments rendered in such proceedings shall be levied only on partnership property."

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The validity or regularity of the proceedings of the county court are not directly called in question by this action, and yet the fact cannot be overlooked that unless that court acquired jurisdiction under the provisions of the section cited, its judgment as against Nelson is absolutely void, a result evidently not contemplated by the plaintiff therein or the court.

It is not necessary to review the cases cited in the brief of the plaintiffs in error. It is sufficient that the conclusion here reached in nowise conflicts with *King v. Bell*, 13 Neb., 412, *Morrissey v. Schindler*, 18 Neb., 672, *Rowland v. Shephard*, 27 Neb., 494, and *First Nat. Bank v. Sloman*, 42 Neb., 350. It follows that the petition states a cause of action and that the decree restraining the sale of the lot described, to satisfy the judgment against Nelson & Hanson, is right and should be

AFFIRMED.

CHARLES E. DOLAN V. STATE OF NEBRASKA.

44	643
47	297

FILED APRIL 5, 1895. No. 6913.

Instructions in Criminal Cases: DUTY OF COURT. It is the duty of the trial court, particularly in criminal prosecutions, whether so requested or not, to present the issues to the jury by instructions, and a charge which, by the omission of certain elements, has the effect of withdrawing from the consideration of the jury an essential issue of the case is erroneous. (*Carleton v. State*, 43 Neb., 373.)

ERROR to the district court for Lancaster county. Tried below before TIBBETS, J.

John P. Maule and *Charles A. Robbins*, for plaintiff in error:

The court erred in not instructing the jury that under

the information the prisoner could be convicted of assault and battery. (*Thurman v. State*, 32 Neb., 224; *Penderson v. State*, 21 Tex. App., 485.)

A. S. Churchill, Attorney General, and F. W. Collins,
for the state.

POST, J.

This was a prosecution in the district court for Lancaster county on an information charging the crime of assault with intent to murder. A verdict was returned finding the accused guilty as charged, and a motion for a new trial having been overruled, he was sentenced to a term in the penitentiary, which he seeks to reverse by means of this proceeding.

The only assignment which we shall notice is that the charge of the court excluded from the consideration of the jury the question of the defendant's guilt of a lower grade of assault, and required them to convict, if at all, of the crime charged. The instruction to which exception is taken is as follows:

"The assault by the defendant upon the person of Albert Eisler at the time and place alleged in the information is not denied, but it is contended by the defendant that at the time of the assault he was under the influence of liquor and acted irresponsibly. Upon this point you are instructed that drunkenness is no excuse for the commission of a crime. You should consider, however, the testimony upon this point in determining whether or not one of the elements necessary to constitute the crime existed, and that element is the intent of the defendant to kill Albert Eisler at the time of making the assault. If at the time of making the assault the defendant was under the influence of liquor, and to such an extent that he was unable to distinguish between right and wrong, and committed the act without any defined purpose to kill, he would not be guilty

as charged. If, however, the defendant, at the time of the assault, was able to distinguish between right and wrong, and able to form a definite purpose in his mind to kill Albert Eisler, then the defendant is responsible for his act. In determining this question, if the evidence raises any doubt in your minds as to the formation of such intent by the defendant at the time of the assault, he is entitled to the benefit of the doubt and should be acquitted."

The only reference which need be made to the defendant's evidence is that it tended strongly to prove that he was at the time of the alleged assault (by shooting with a revolver) intoxicated, so drunk, in fact, that he was not conscious of the act of shooting, and incapable of entertaining the specific intent essential to the crime of murder had death ensued as the result of the act charged. Whether the jury should have credited such evidence is not for us to say. It is sufficient that he was entitled to have it considered under proper instructions by the court. In *Volmer v. State*, 24 Neb., 838, a case quite similar, so far as the question at issue is concerned, to the one at bar, the failure to advise the jury that they might convict of the lower grade of offense (manslaughter) was held reversible error. But it is argued by the state that the instruction is a correct statement of the proposition therein contained, and if the accused desired a direction on the subject of assault with intent to inflict great bodily injury, assault and battery, or a simple assault, he should have made such request at the trial. The information included a charge of the lower degrees of assault, as well as assault with intent to murder (2 Bishop, Criminal Procedure, 63), and it was the right of the accused to have all of the issues properly submitted to the jury. We had occasion recently in the case of *Carleton v. State*, 43 Neb., 373, to examine the subject with care, and the conclusion therein announced is that it is the duty of the trial court to properly present the issues to the jury, and a charge as a whole which, by the omis-

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sion of certain elements, has the effect of withdrawing from the consideration of the jury essential issues is erroneous. In *State v. Vinsant*, 49 Ia., 241, which was a prosecution for rape, the court say: "Whoever is charged with rape is charged with all that constitutes it, and one of the elements of rape is an assault," and the judgment was reversed because the jury were not directed to find the accused guilty of a simple assault in case the evidence warranted such a verdict. (See, also, *Commonwealth v. Drum*, 19 Pick. [Mass.], 480.) And in a note to section 2494, 2 Thompson, Trials, it is said that the court ought not so to instruct the jury as to take from them the right of determining the grade of the crime of which the accused stands charged, citing, in addition to the cases referred to, *Adams v. State*, 29 O. St., 412, and *Shaffner v. Commonwealth*, 72 Pa. St., 60. It is true that the exception includes several other paragraphs of the charge which are admitted to be correct; but the foregoing instruction, which is the only one having any bearing upon the subject, is set out not for the purpose of criticism, but in order to demonstrate that the issue of the defendant's guilt of the lesser grades of assault was not in fact submitted to the jury. For reasons stated the judgment is reversed and the cause remanded for further proceedings in the district court.

REVERSED AND REMANDED.

C. F. M. STARK, APPELLANT, V. MAGNUS OLSEN ET AL.,
APPELLEES.

FILED APRIL 5, 1895. No. 5945.

1. **Conflict of Laws: EXECUTION OF NOTE AND MORTGAGE.**
On the 13th day of March, 1886, in Cedar county, this state, O.
and wife executed and delivered a mortgage conveying lands in

44	646
147	652

44	646
49	385
51	515
51	840
52	408
53	787

44	646
159	448

44	646
60	25

44	646
62	468

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said county to D., a resident of Iowa, to secure a loan made by the latter, a loan broker, in the usual course of business. *Held*, In the absence of evidence explanatory of the transaction, the presumption is that the payment of the proceeds of the loan and the delivery of the note and mortgage were contemporaneous acts, and that the note is not an Iowa contract, although it appears from its face to have been executed in that state twelve days previous to the execution of the mortgage.

2. ———. In the absence of evidence to the contrary, laws of other states will be presumed to be the same as ours.

3. ———. Such presumption applies not alone to the written but as well to the unwritten laws of other states.

4. **Negotiable Instruments: PROVISION FOR ATTORNEYS' FEES.**

A note, otherwise in form negotiable, will not be held non-negotiable by reason of a provision therein for an attorney's fee in case suit is brought thereon to enforce collection.

5. ———: **PROVISION TO DECLARE DEBT DUE.** Nor will a note be held non-negotiable on account of the following condition: "If default be made in the payment of any interest coupon, said principal sum may, at the option of the holder of this note, become due and payable without further notice." (*Heard v. Dubuque County Bank*, 8 Neb., 10.)

6. **Mortgages: NOTES: EVIDENCE OF INDORSEE'S TITLE TO SECURITY.** In an action of foreclosure it appeared that O., the defendant, borrowed money of D. and executed a note therefor to D.'s wife, secured by an instrument denominated a mortgage or trust deed, in which D. was named as trustee with power to reconvey on payment of the note at maturity. On the day of its execution D. indorsed said note in the name of his wife and forwarded it to his correspondent in Boston, by whom it was on the day of its receipt sold and indorsed for value, accompanied by the mortgage, to C. J. S., through whom, by will duly proved, the plaintiff claims title. It was the custom of D. to take securities, payable to his wife's order, and dispose of them through eastern brokers by indorsement in her name with her knowledge and consent. *Held*, Sufficient evidence of title as against the mortgagor.

7. ———: **REGISTRATION OF ASSIGNMENTS: NOTES: BONA FIDE HOLDERS.** Section 39, chapter 73, Compiled Statutes, providing that "the recording of an assignment of a mortgage shall not in itself be deemed notice of such assignment to the mortgagor, * * so as to invalidate any payment made by them, or either of them, to the mortgagee," has no application to the

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holder of negotiable securities whose title was acquired before maturity for value in the usual course of business. (*Eggert v. Beyer*, 43 Neb., 711.)

8. **Power of Trustee Under Deed: NOTICE.** Where a trustee is invested with the apparent title to property, persons dealing with him are not chargeable with undisclosed limitations upon his power with respect to the subject of the trust; but where his powers are clearly defined by deed or other instrument creating the trust, duly filed or recorded in conformity with the registration laws, persons dealing with him in respect to the trust property must at their peril take notice of the extent of such power.
9. **Principal and Agent: DISCHARGE OF MORTGAGE BEFORE MATURITY: AUTHORITY.** Agency with power to acknowledge satisfaction of a mortgage before maturity will not be presumed, as against a *bona fide* holder, from the mere fact that the mortgagee, who had disposed of the security in the usual course of business, forwards to his correspondent at whose office it is payable funds for the satisfaction of interest coupons.

APPEAL from the district court of Cedar county. Heard below before NORRIS, J.

The facts are stated in the opinion.

Barnes & Tyler, for appellant:

The stipulation for payment of an attorney's fee does not render the note non-negotiable. (*Sea v. Glover*, 1 Ill. App., 335; *Carlton v. Kenealy*, 12 M. & W. [Eng.], 139; *German Mutual Fire Ins. Co. v. Franck*, 22 Ind., 364; *Chicago Railway Equipment Co. v. Merchants Nat. Bank*, 136 U. S., 268.)

A provision in a note allowing the payee to declare the debt due does not impair the negotiability of the instrument. (*Heard v. Dubuque County Bank*, 8 Neb., 10; *Chicago Railway Equipment Co. v. Merchants Nat. Bank*, 136 U. S., 268; *Sperry v. Horr*, 32 Ia., 184.)

The negotiability of the note is to be determined by the law of the place where it was made. (1 Randolph, Com-

mercial Paper, sec. 47; 1 Daniel, Negotiable Instruments, sec. 874; *Warder v. Arell*, 2 Wash. [Va.], 282.)

Registration of assignment could not affect the rights of a *bona fide* holder of the note. (*South Branch Lumber Co. v. Littlejohn*, 31 Neb., 606; *Williams v. Keyes*, 51 N. W. Rep. [Mich.], 522.)

An instrument given to secure the payment of money is a mortgage. (*Hurley v. Estes*, 6 Neb., 386; *Webb v. Hoselton*, 4 Neb., 318; *Cotterell v. Long*, 20 O., 464; *Sargent v. Howe*, 21 Ill., 149.)

The deed of trust is a mere incident to the debt, and passed with the assignment of the note. (*Studebaker Mfg. Co. v. McCargur*, 20 Neb., 500; *Kuhns v. Bankes*, 15 Neb., 92; *Webb v. Hoselton*, 4 Neb., 308; *Kyger v. Ryley*, 2 Neb., 28; *Carpenter v. Longan*, 16 Wall. [U. S.], 271.)

Payment to the original trustee after the note and trust deed had been transferred by him to an innocent purchaser for value before maturity did not affect the rights of the latter to enforce payment. (*Best v. Crall*, 23 Kan., 482; *Davis v. Miller*, 14 Gratt. [Va.], 13; *Dutton v. Ives*, 5 Mich., 515; *Blumenthal v. Jassoy*, 29 Minn., 177; *Grant v. Kidwell*, 30 Mo., 455; *Swall v. Clarke*, 51 Cal., 227; *Webster v. Lee*, 5 Mass., 334; *Burhaus v. Hutcheson*, 25 Kan., 625; *Block v. Kirtland*, 21 Ark., 393.)

On the question of agency the court is referred to the following cases: *Thomas v. Bowman*, 29 Ill., 426, 30 Ill., 84; *Minell v. Reed*, 26 Ala., 730; *Furnas v. Frankman*, 6 Neb., 429; *Loomis v. Simpson*, 13 Ia., 532; *Wright v. Boynton*, 37 N. H., 9.

A trustee has only the powers conferred by the trust. When limitations appear of record, persons dealing with him must take notice of his want of authority. He had no power to receive payment and release the debt before it was due, without the consent of the beneficiary. (*Swartout v. Curtis*, 5 N. Y., 301; *Newman v. Samuels*, 17 Ia., 536; *Livermore v. Maxwell*, 55 N. W. Rep. [Ia.], 37.)

Benjamin M. Weed and Carter & Brown, contra:

The note sued upon is non-negotiable. (1 Daniel Negotiable Instruments, sec. 30; *Bank of Carroll v. Taylor*, 25 N. W. Rep. [Ia.], 810; *Hegeler v. Comstock*, 45 N. W. Rep. [S. Dak.], 333; *Dow v. Updike*, 11 Neb., 95; *First Nat. Bank of Stillwater v. Larsen*, 19 N. W. Rep. [Wis.], 67; *McComas v. Haas*, 8 N. E. Rep. [Ind.], 579; *Hughitt v. Johnson*, 28 Fed. Rep., 865; *Smith v. Marland*, 59 Ia., 645; *Hardin v. Olson*, 14 Fed. Rep., 705; *Lamb v. Story*, 45 Mich., 488; *Hall v. Toby*, 1 Atl. Rep. [Pa.], 369; *Maryland Fertilizing & Mfg. Co. v. Newman*, 29 Alb. L. J. [Md.], 213; *Garretson v. Purdy*, 14 N. W. Rep. [Dak.], 100; *Jones v. Radatz*, 27 Minn., 240; *First Nat. Bank of Trenton v. Gay*, 63 Mo., 38; *Andrews v. Pond*, 13 Pet. [U. S.], 65; *Thompson v. Ketcham*, 4 Johns. [N. Y.], 285; *Stix v. Mathews*, 63 Mo., 371; *Mahoney v. Fitzpatrick*, 133 Mass., 151; *Way v. Smith*, 111 Mass., 523; *Whitwell v. Winslow*, 134 Mass., 343; *Palmer v. Ward*, 6 Gray [Mass.], 340; *Russell v. Swan*, 16 Mass., 314; *Blakeley v. Grant*, 6 Mass., 386; *Quigley v. Mexico Southern Bank*, 80 Mo., 295; *Van Eman v. Stanchfield*, 10 Minn., 197; *Farris v. Wells*, 68 Ga., 604; *Hadden v. Rodkey*, 17 Kan., 429; *Canal Bank v. Bank of Albany*, 1 Hill [N. Y.], 287.)

As to the questions of assignment, the effect of payment by appellees, and the release of the trust deed the following authorities are cited: *Ellis v. Sisson*, 96 Ill., 105; *Willis v. Twambly*, 13 Mass., 204; *Bush v. Lathrop*, 22 N. Y., 535; *Crocker v. Whitney*, 10 Mass., 316; *Jones v. Witter*, 13 Mass., 304; *Miller v. Kreiter*, 76 Pa. St., 78; *Heermans v. Ellsworth*, 64 N. Y., 159; *Noble v. Thompson Oil Co.*, 79 Pa. St., 354; *Hull v. Conover*, 35 Ind., 372; *Prescott v. Hull*, 17 Johns. [N. Y.], 284; *Osgood v. Artt*, 17 Fed. Rep., 575; *Shufeldt v. Gillilan*, 124 Ill., 460; *Bank of Stockton v. Jones*, 65 Cal., 437; *Merrell v. Springer*, 24 N. E. Rep. [Ind.], 259; *Reed v. Marble*, 10 Paige [N. Y.],

409; *Union College v. Wheeler*, 61 N. Y., 88; *Johnson v. Carpenter*, 7 Minn., 120; *McCabe v. Furnsworth*, 27 Mich., 52; *Jones v. Smith*, 22 Mich., 360; *Rogers v. De Forest*, 7 Paige [N. Y.], 272; *Perkins v. Dibble*, 10 O., 440; *Waters v. Waters*, 20 Ia., 363; *Terry v. Allis*, 16 Wis., 504.

As to the power of the trustee to receive payment the following authorities are cited: *Connecticut General Life Ins. Co. v. Eldredge*, 102 U. S., 545; *Williams v. Jackson*, 107 U. S., 478; *Hadley v. Chapin*, 11 Paige [N. Y.], 253; *Van Rensselaer v. Aikin*, 22 Wend. [N. Y.], 249; *McNair v. Picotte*, 33 Mo., 57; *Verges v. Giboney*, 47 Mo., 171; *Renfro v. Adams*, 62 Ala., 302; *Daniels v. Densmore*, 32 Neb., 40; *Bryant v. Richardson*, 25 N. E. Rep. [Ind.], 808.

As to the question of agency the following cases are cited: *Sherwood v. Saxton*, 63 Mo., 78; *Chesley v. Chesley*, 49 Mo., 540; *Cassady v. Wallace*, 15 S. W. Rep. [Mo.], 138; *Livey v. Winton*, 30 W. Va., 554.

POST, J.

This is a proceeding for the foreclosure of a mortgage or trust deed executed by the appellees Olsen and wife, covering certain lands in Cedar county. In addition to the mortgagor and wife the Lombard Investment Company and Andrew Burggen were named as defendants, but as their rights are not involved in this appeal they will not be noticed further in this opinion. The mortgage, which was acknowledged before a notary public of Cedar county on the 13th day of March, 1886, was given to secure payment of the note of Olsen purporting to have been executed at Le Mars, Iowa, March 1, 1886, for \$1,500, payable to the order of P. M. Dunn at Boston, Massachusetts, March 1, 1891, with interest from date at seven per cent, payable semi-annually, as evidenced by coupons attached thereto. Said mortgage or trust deed was executed to J. M. Dunn, as trustee for P. M. Dunn, the payee of the note

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above described, and provides that the said trustee shall have power to reconvey said premises whenever said principal note and interest coupons are fully paid to the said P. M. Dunn or her assigns. In this connection it should be mentioned that J. M. Dunn, who is named as trustee in said mortgage, was, at the time of the execution thereof, engaged in making loans at Le Mars and negotiating the notes and mortgages taken in the course of his business through brokers in New York, Boston, and elsewhere. It was customary for him to name P. M. Dunn, his wife, as payee of notes so taken, and to indorse them, when disposed of, in her name. She had no knowledge of the note and mortgage in this case, but the practice of her husband in thus dealing in her name is shown to have been with her knowledge and consent, if not, indeed, with her express approval. It should be mentioned also that she has so far ratified his action with respect to the transaction here involved as to disclaim any interest in the note or mortgage. On the 16th day of March, 1886, J. M. Dunn forwarded said note and mortgage to the firm of John Jeffries & Sons, brokers, doing business in Boston, with directions to sell the same and remit the proceeds thereof through his correspondent in New York. The note at that time bore the following indorsement executed by J. M. Dunn:

“Without recourse I hereby sell, transfer, and set over to John Jeffries & Sons the within note and annexed coupons, together with all my rights and interest under the trust deeds securing the same. P. M. DUNN.”

On the 11th day of March, 1886, the plaintiff, C. F. M. Stark, then acting as agent for his mother, Mrs. C. J. Stark, applied to Jeffries & Sons for investments, and was furnished with a list of securities held by them for sale, including this mortgage of which they had been previously advised by Dunn. Said mortgage was selected by Mr. Stark among others, and the agreed price therefor, \$1,502.91, left with the brokers named as a special deposit

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until the receipt of the note and mortgage, which was on the 20th day of the same month, and on which day they were delivered to the purchaser, said note bearing the indorsement of Jeffries & Sons identical in form with that above set out, although no written assignment of the mortgage by the said P. M. Dunn, or in her name, was made at that time. Previous to the commencement of this action Mrs. Stark died, and by her will, which was duly proved, the plaintiff, her only heir and sole devisee, was named as sole executor. The latter deeming an assignment of the note essential in order to perfect his title, as executor, indorsed the same without recourse to Geo. K. Barstow, a clerk in the office of Jeffries & Sons, by whom it was immediately in the same manner indorsed and transferred to him, accompanied by the mortgage. The foregoing history of the transactions upon which the plaintiff's title depends is essential to an understanding of the issues presented, as will hereafter appear.

It is deemed necessary to here notice some of the allegations of the answer of Olsen and wife, viz.:

1. That on or about December 8, 1888, they paid to P. M. Dunn and J. M. Dunn, trustee, the full amount of said note, with interest, and that the said P. M. Dunn and J. M. Dunn, trustee, executed and delivered to them a release in writing, whereby they acknowledged satisfaction in full of the said mortgage.

2. That no assignment of said mortgage had ever been filed for record in Cedar county, and that they had no knowledge or information that it had been assigned to, or was owned by, any person other than the mortgagee.

3. An express denial of the assignment by P. M. Dunn and an allegation that the pretended assignment in her name by J. M. Dunn was unauthorized and void.

4. That the said J. M. Dunn was, at the date of the alleged payment by the defendants, the general agent of the plaintiff and John Jeffries & Sons, with power to re-

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ceive payment and execute a release of said mortgage in the name of the holder thereof.

In support of the allegation first above mentioned they introduced in evidence a written instrument bearing date of December 8, 1888, purporting to have been executed by P. M. Dunn and J. M. Dunn as trustee, whereby, in consideration of \$1 and other good and valuable considerations, they "remit, convey, and quitclaim" to Magnus Olsen all their title, claim, or demand through a trust deed for the premises described in the pleadings, executed March 1, 1886. Said instrument was acknowledged before a notary public for Plymouth county, Iowa, and filed for record in Cedar county, December 17 following. We may for our present purpose construe it as referring to the mortgage which is the subject of this controversy, although not definitely described therein. Another fact to which our attention is directed by the briefs of counsel, but which sheds no direct light upon the transactions involved, is that Mrs. Dunn, on the 26th day of February, 1891, executed what purports to be a formal assignment of the mortgage or trust deed to Mrs. Stark, but in which the land mentioned therein is erroneously described as situated in Dixon county. There is, however, one fact worthy of note in this connection as tending to illustrate the business relations between Mrs. Dunn and her husband, viz., that the instrument last mentioned, including the name of the assignor in the body thereof, is upon a printed form, which is strongly corroborative of the statement that it was the custom of her husband to take securities in her name.

The first proposition to which we will give attention is that the note in this case is by its terms non-negotiable, because it is uncertain both as to amount and time of payment. The condition to which we are referred to support that contention is the following: "And if default be made in the payment of any interest coupon or part thereof, then said principal sum may, at the option of the legal holder

of this note, become due and payable without further notice; and if suit be commenced to collect this note or foreclose the trust deed securing the same, I agree to pay a reasonable attorney's fee as provided by law. This note bears ten per cent interest per annum from maturity until fully paid." The note, as has been remarked, purports to have been executed at Le Mars, in the state of Iowa, while the mortgage was executed in this state, the consideration for both being the loan mentioned. It is also disclosed by the record that said loan was made on the written application of Olsen, the mortgagor, in accordance with the custom of loan brokers. The inquiry is, therefore, naturally suggested whether the note is an Iowa contract and to be governed by the laws of that state, or whether the laws of this state will be applied in order to determine its negotiability. We shall not, however, undertake a careful examination of the authorities bearing upon the subject, since a solution of the question may be readily attained from a closer inspection of the facts established by the record. We have not the benefit of the testimony of either of the Olsens, or of J. M. Dunn, but the mortgage, as we have seen, was executed and delivered twelve days subsequent to the date borne by the note. From the deposition of W. L. Jeffries, a member of the firm of Jeffries & Sons, we learn that the application of Olsen for the loan was forwarded to said firm "shortly prior to March 11," and that on the day last named the witness advised Dunn by telegraph of the sale of the loan. The irresistible inference from these facts is that the delivery of the note and mortgage and the payment to Olsen of the proceeds of the loan were contemporaneous acts, that they occurred as late as the 13th day of March, presumably in Cedar county, and that the former is, therefore, for all purposes, a Nebraska contract. But the laws of this state must govern the construction of the contract for another reason. The plaintiff alleges that the note was executed in Iowa, and pleads the statute of

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that state authorizing the allowance of an attorney's fee which he claims in this action. That allegation is, however, put in issue by the answer and is not supported by any evidence in the record. We must presume, therefore, that the laws of Iowa, so far as they relate to the subject under consideration, are the same as ours. (*Ruth v. Lowrey*, 10 Neb., 260; *Lord v. State*, 17 Neb., 526; *Fitzgerald v. Fitzgerald & Mallory Construction Co.*, 41 Neb., 374.) Turning to the decisions of this court we find the question fully settled by *Heard v. Dubuque County Bank*, 8 Neb., 10, where, referring to the question of costs and attorneys' fees, it is said: "We do not think that the amount of money represented by a note or bill is made any the less certain by reason of its containing a stipulation that if it is not paid at maturity the maker will pay a part of the expenses of its collection. * * * The stipulation to pay attorney fees is harmless, to say the least, while the note is undishonored and entitled to pass as commercial paper. It is only when it has become dishonored by its maker and ceases to have any standing in the commercial world that this provision becomes operative." It was further held that the note therein was negotiable notwithstanding the following provision: "The said McDonald & Co. [payees] have full power to declare this note due and take possession of said machine at any time they may deem themselves insecure, even before the maturity of the note."

It is urged however, by defendants that the note being payable in Massachusetts the question whether it is an Iowa or a Nebraska contract is wholly immaterial, for the reason that its character as regards negotiability must be determined by the laws of the state in which it is, by its terms, to be performed. It is not necessary to determine here whether the rule contended for has any application to mortgage securities, since what has been said respecting the laws of Iowa applies with equal force to those of Massachusetts. The presumption above alluded to is not limited to

statutory enactments, but applies as well to the unwritten law of other states. (Rorer, Interstate Law, 122, and cases cited.) Assuming, therefore, that the note was not negotiable according to the laws of Massachusetts, that fact, to be available to the defendants, should have been specially pleaded and proved as any other matter material to the rights of the parties.

This brings us to the question of the plaintiff's title to the securities. The contention of the defendant, as will be inferred from what has been said, is that the indorsement by J. M. Dunn in the name of his wife is in legal effect a forgery and cannot, therefore, be made the basis of a legal title. The fact, however, that the business was conducted in her name, that she was aware of the custom of her husband in that regard, and especially of his course of dealing with Jeffries & Sons, not to mention her subsequent express ratification of his act, leaves no room to doubt his agency with power to contract in her name. But there is an additional fact of which mention was omitted in its natural order, and which should be noticed on account of its bearing upon this as well as upon another phase of the case. The coupons accompanying the note were assigned directly to Mrs. Stark, and those, seven in all, which matured prior to March 1, 1890, were paid by remittances from J. M. Dunn and presumably returned to the maker, and bearing as they did the indorsement of Mrs. Dunn, were sufficient to charge him, defendant, with a notice of her equities.

The next question discussed involves a construction of sections 39 and 46, chapter 73, Compiled Statutes, entitled "Real Estate." Section 46 merely authorizes the recording of assignments of mortgages. Section 39 provides: "The recording of an assignment of a mortgage shall not in itself be deemed notice of such assignment to the mortgagor, his heirs or personal representatives, so as to invalidate any payment made by them, or either of them, to the mortgagee." Those provisions were before us for our con-

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struction in the recent case of *Eggert v. Beyer*, 43 Neb., 711, and the conclusion therein is decisive of every proposition asserted in connection with this branch of the case. It is in effect there held that the statute has no application to the holder of negotiable paper secured by mortgage whose title is acquired in the usual course of business for value before maturity, and that if the mortgagor in such case chooses to make payment to another than the holder of the security, he must do so at his peril. To the authorities there cited may be added the recent case of *Williams v. Keyes*, 90 Mich., 290, in which it is said, referring to the same provision: "The statute means no more than that the mortgagor shall not be required to search the record before making payment to the one *prima facie* entitled to receive it. In case of negotiable securities the holder alone is *prima facie* entitled to receive payment." The analysis of the subject in the cases cited is so thorough and satisfactory as to leave nothing to be added at this time, and the rule therein stated must be accepted as the law of this case.

It is contended also that whatever may have been the rights and obligations of J. M. Dunn as to P. M. Dunn, the payee of the note, or her assigns, he was authorized as trustee to execute the release and his action in that regard is a sufficient protection to the defendant in this action. But his authority must be determined from the instrument itself, which is in reality a mortgage, although on its face referred to both as a mortgage and a deed of trust. And unfortunately for the defendant's contention, it confers no authority upon the trustee to acknowledge satisfaction before the maturity of the debt thereby secured, or upon any condition except payment in full to the holder of the security, or with his consent. It should be remembered here that a wide distinction is recognized between a case like this where the trustee is a mere agent for the beneficiary, whose powers are clearly defined by the instrument creating the trust, and one in which he is the holder of the

legal title. In the latter case it is well settled, on principle as well as authority, that persons dealing with the trustee are not chargeable with undisclosed limitations upon his power. Although the rule thus stated is elementary law, it is not out of place to cite in this connection the case of *Livermore v. Maxwell*, and four other cases, 55 N. W. Rep. [Ia.], 37, which are instructive, since they are authority for the principle here applied, and for the further reason that they involve transactions of the same trustee in all essential respects identical with that presented by the record in this case. The court there say: "Even if Mr. Dunn did have authority to receive payment at maturity of the note, that did not authorize him to receive it when he did. The note was payable 'on the 1st day of December, 1890,' not on or before, yet Mr. Dunn assumed to receive payment nearly two years before it was due. It is argued that as Mrs. P. M. Dunn joined in the release of the deed, the payment should be held good as to these defendants. The defendants knew that the note was negotiable by indorsement, they had each paid interest coupons that were returned to them bearing the indorsement to the plaintiff, and they knew that neither J. M. nor P. M. Dunn had the note or coupons to surrender at that time the payment was made. We are in no doubt but that these defendants knew that the note and coupons had been transferred and made the payment upon the mistaken belief that J. M. Dunn had authority as trustee to receive it." We agree with what is there said, as well as the conclusion reached.

Finally, it is argued that J. M. Dunn was the agent of the plaintiff and of his mother, Mrs. Stark, during the lifetime of the latter, and authorized to receive payment in their behalf; but that contention has no foundation whatever in the record. The only evidence which can be said to bear upon the question is the fact that Dunn forwarded to Jeffries & Sons the amount of the coupons as they matured. The law will not from that fact alone infer the

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relation of principal and agent as against the plaintiff. The reasonable inference is that suggested by the supreme court of Iowa, viz., that the payments of both principal and interest were made by the defendant to J. M. Dunn in the mistaken belief that the latter, as trustee, was authorized to receive it; but, however that may be, it is evident that to the extent which he, Dunn, acted in a representative capacity in the receipt of the money he was the agent of the defendant Olsen and not of the plaintiff.

It follows from what has been said that the decree should have been for the plaintiff. It will accordingly be reversed and remanded to the district court for a decree in accordance with this opinion

REVERSED AND REMANDED.

ALFRED E. HARGREAVES ET AL., APPELLANTS, V. LUDWIG KORCEK ET AL., APPELLEES.

FILED APRIL 5, 1895. No. 5878.

1. **Mortgages: DURESS: EVIDENCE: HUSBAND AND WIFE.** Threats of prosecution and immediate imprisonment of the husband, when used to induce a man and his wife to execute and deliver a mortgage upon their homestead to secure the payment of a judgment against him, where the threats so overcome their wills as to induce them to affix their signatures to such mortgage and thus give a security which they would not voluntarily have executed, are sufficient to constitute duress and avoid the operation of the instrument so obtained.
2. **Duress: CANCELLATION OF MORTGAGE: EVIDENCE.** The evidence examined, and *held*, sufficient to support the findings and decree of the district court.

APPEAL from the district court of Buffalo county.
Heard below before HOLCOMB, J.

A statement of the case appears in the opinion.

Tibbets, Morey & Ferris, for appellants:

To support the contention that the mortgage was not executed under duress the following cases were cited: *Mundy v. Whittemore*, 15 Neb., 647; *Wilson Sewing Machine Co. v. Curry*, 25 N. E. Rep. [Ind.], 896; *Sornborger v. Sanford*, 34 Neb., 499; *Harmon v. Harmon*, 61 Me., 231; *Plant v. Gunn*, 2 Woods [U. S.], 372; *Thorn v. Pinkham*, 24 Atl. Rep. [Me.], 718; *Mascola v. Montesanto*, 61 Conn., 50; *Huckley v. Headley*, 45 Mich., 569; *Griffith v. Sitgreaves*, 90 Pa. St., 161; *Green v. Scranage*, 19 Ia., 461; *Humphrey v. Humphrey*, 79 N. Car., 396; *Stouffer v. Latschaw*, 2 Watts [Pa.], 167; *Alexander v. Pierce*, 10 N. H., 494; *Meek v. Atkinson*, 1 Bailey [S. Car.], 84; *Compton v. Bunker Hill Bank*, 96 Ill., 301.

Oldham & Murphy, contra.

The efforts to convince appellees that Mr. Korcek had committed a crime, and the threats of sending him to the penitentiary for a term of years if the debt was not secured by a mortgage on the homestead, constitute duress, and vitiate the mortgage. (*Meech v. Lee*, 46 N. W. Rep. [Mich.], 383; *Lomerson v. Johnson*, 13 Atl. Rep. [N. J.], 11; *McCormick Harvesting Machine Co. v. Hamilton*, 41 N. W. Rep. [Wis.], 727; *Strang v. Peterson*, 10 N. Y. Sup., 139; *Miller v. Bryden*, 34 Mo. App., 602; *Adams v. Irving Nat. Bank*, 116 N. Y., 606; *Morrison v. Faulkner*, 15 S. W. Rep. [Tex.], 797; *Schultz v. Catlin*, 47 N. W. Rep. [Wis.], 946; *Mayer v. Oldham*, 32 Ill. App., 233; *Winfield Nat. Bank v. Croco*, 26 Pac. Rep. [Kas.], 939; *Morrill v. Nightingale*, 28 Pac. Rep. [Cal.], 1068; *Bryant v. Peck*, 28 N. E. Rep. [Mass.], 678; *Morse v. Woodworth*, 29 N. E. Rep. [Mass.], 525.

Dryden & Main, also for appellees.

HARRISON, J.

The appellants commenced an action in the district court of Buffalo county against the appellees to foreclose a mortgage on real estate, alleging, in substance, that on the 11th day of July, 1889, appellants obtained a judgment against Ludwig Korcek in said district court for the sum of \$1,093.48, and on the 12th day of July, 1889, Ludwig Korcek and his wife Mary, for the purpose of securing the payment of the indebtedness evidenced by the judgment, executed and delivered to appellants, a mortgage deed conveying to them the south half of the southwest quarter of section 10, township 9 north, of range 15 west, in Buffalo county, Nebraska; that by the terms of the mortgage the judgment was to be paid July 10, 1890. There was an allegation of default in the condition of the mortgage in regard to payment. It was also pleaded that certain persons and firms had, or claimed to have, judgment liens upon the premises described in the mortgage, "And plaintiffs allege that such judgments are not liens upon the above described premises, for the reason that said Ludwig Korcek is a married man and the head of a family, and with his said wife, Mary Korcek, occupies and holds said premises as their homestead, and the same are of a less value than \$2,000." The petition closed with a prayer for foreclosure, deficiency judgment, etc. To this petition various judgment and other creditors of Ludwig Korcek filed answer, each setting up a claim and praying such relief as was deemed appropriate in the particular instance, by the pleader. It appears that Ludwig Korcek had been in mercantile business in Kearney, Nebraska, for a number of years and just prior to the execution of the mortgage, the basis of this action, disposed of his stock of merchandise and the business; that the judgment recovered by appellants against Ludwig Korcek which the mortgage was given to secure was for the amount of an account in their

favor for merchandise sold to him. Korcek's sale of his stock of merchandise was, he alleges, used by appellants as the foundation for the threats made by them to obtain the execution of the mortgage in suit in the case at bar. This statement will serve to explain the reference in the portion of the answer of appellees quoted herein to the sale of the stock of merchandise. The Korceks filed separate answers and subsequently filed an answer, in which they joined, and which was treated as an amended answer. In this they admitted the indebtedness of Ludwig Korcek to the appellants in some amount, the rendition of judgment, the execution of the mortgage, that appellees were husband and wife, the homestead character of the premises described in the petition and their residence thereon, but denied that Mary Korcek was indebted to appellants in any sum or in any manner. They further answered as follows:

"That on or about the 12th day of July, 1889, * * * a practicing lawyer of the city of Lincoln, Nebraska, and the then attorney of the plaintiffs aforesaid, together with a salesman in the employ of the plaintiffs aforesaid, visited the said Ludwig and Mary Korcek for the purpose of obtaining security on said account; that the said attorney and said salesman, for the purpose of inducing these answering defendants to execute said mortgage as aforesaid, falsely and fraudulently represented to the said Ludwig and Mary Korcek that the said Ludwig Korcek had unlawfully, fraudulently, and feloniously sold and disposed of said stock of merchandise and concealed the same, or a part thereof, for the purpose of defrauding his creditors, and the plaintiffs in particular, and that unless the said Ludwig and Mary Korcek executed and acknowledged to the plaintiffs a mortgage upon the premises hereinbefore described, to secure the said claim, that the said Ludwig Korcek would be arrested, prosecuted, and imprisoned in the penitentiary of the state of Nebraska; that said plaintiff-

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iffs, by their said agents as aforesaid, represented to the said Ludwig and Mary Korcek that a warrant had already been issued for the arrest of the said Ludwig Korcek for said crime as aforesaid, and that the same was in the possession of the sheriff of Buffalo county and would be served, and the said Ludwig Korcek immediately taken to jail, unless said mortgage was executed upon said premises as aforesaid.

* * *

"8. These answering defendants allege that it is wholly untrue that the said Ludwig Korcek had been guilty of disposing of said property for the purpose of cheating and defrauding his creditors and deny that he had been guilty of any criminal offenses whatever, and the said defendant Mary Korcek alleges that at the time the said mortgage was executed she was wholly ignorant of the facts as to the alleged criminal offenses except as advised by the said attorney and the said salesman, agents of the plaintiffs as aforesaid, and was wholly ignorant of the law governing the same; that she is of German nationality and understands the English language very imperfectly, and that by reason thereof, and by reason of said false and fraudulent representations of the agents of the plaintiff as aforesaid, and being, as aforesaid, entirely ignorant of the facts and of the law, the said Mary Korcek and the said Ludwig Korcek were in great fear of immediate arrest and incarceration of the said Ludwig Korcek, husband of the said Mary Korcek, defendant as aforesaid, and by reason of the said threats and undue influence, and while thus agitated and put in fear by reason of the said fraudulent statements and threats and misrepresentations of the said plaintiffs as aforesaid, and acting under fear of said imprisonment, these answering defendants signed said pretended mortgage upon their homestead without consideration, and not otherwise."

There were some other allegations contained in the answer, but we need not consider them here. The prayer of the answer was that the mortgage be declared null and void

and canceled of record. The reply filed by appellants was a general denial of all new matter contained in the amended answer. A trial to the court of the issues between the appellants and the Korceks resulted in a finding in favor of the Korceks and a decree declaring the mortgage null and void and ordering its cancellation, and plaintiffs in the district court have appealed to this court.

There was a sharp and decided conflict in the testimony adduced with reference to what was said by the various persons who were present at the home of the Korceks on the day when the mortgage to appellants was executed, but there was ample evidence to support the finding of the trial court, and following the well established rule of this court, the finding will not be disturbed. It remains then to determine whether the Korceks were under duress at the time they signed and delivered the mortgage. The parties who represented appellants drove from Kearney to Korcek's farm, where they arrived about 9 or 10 o'clock in the forenoon and remained until 3 or 4 in the afternoon, being the greater portion of the time they were there engaged in endeavoring to obtain the execution of the mortgage, and which they finally accomplished. They took with them from Kearney a law book, the statutes, and—now being guided in our statements mainly by the evidence which must have been followed by the trial court to reach the conclusion it did—it appears that soon after they reached the farm some law was read from this book to the Korceks, and the husband was informed that he had committed a crime and unless he signed the mortgage he would go to the penitentiary, and in Korcek's testimony we find the following:

He said he had a warrant and the sheriff is over across the creek, and if I did not sign the security mortgage the sheriff would take me right away from the place.

Q. Take you to jail?

A. He would take me right away; yes, sir.

Mrs. Korcek states that substantially the same was said

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to her, and they both testify as to their unwillingness and refusal to execute the mortgage, but that finally, influenced by the threats, they did so. There were other witnesses who gave practically the same account of what transpired at Korcek's on that day; one of whom, William Wilson, who went with the parties who were representing appellants, states in his testimony:

They told Korcek they wanted him to sign the mortgage first, and Korcek very naturally objected. Then they went into this penitentiary business. They said: "Mr. Korcek, you have committed a crime, and you are liable to be put in the penitentiary, and we have a warrant for you which the sheriff, John Wilson, now holds, and if you don't sign this mortgage to-day he will arrest you and we will have you put in the penitentiary." They said: "Hargreaves Bros. is a strong firm and vindictive, and they will spend every dollar they have got but what they will put you in the penitentiary." Mr. Korcek objected and said he hadn't committed any more crime than any one else who had sold out had committed. * * *

Q. What was the effect of these threats upon Mrs. Korcek?

A. Mrs. Korcek cried and took on, of course, but she hung out after Mr. Korcek consented to sign the mortgage. She still refused to sign it, and she said that was her home and she didn't feel like signing it away.

Upon the subject of what constitutes duress and whether or not it includes threats and such threats as appear to have been made to the Korceks, there seems to have existed and exist a diversity and contrariety of opinions, the result of which has been decisions of courts of last resort, wherein we find the differences of opinion embodied and expressed, and we have been cited to a number of them, agreeably to the doctrine of which the threats used to influence the Korceks to execute the mortgage did not constitute duress, and would furnish no reason in equity

equity for avoiding the instrument or ordering it canceled; but we are satisfied that the better rule is that where, as in this case, the threat was of immediate imprisonment, accompanied by the statement that the warrant had been issued, whether such statement be true or not, and the threat operates to overcome the will of the party, as in this case, and a settlement is procured which could not have otherwise been obtained, such as resulted here, the execution of a mortgage upon the homestead of the party threatened, which was not subject to the payment of the indebtedness and could not by any process or in any manner, except the voluntary act of the owner, be so subjected, and its further execution by the wife, who did not owe the debt and was not and could not be made liable for its payment, and without whose signature the instrument signed would have been worthless and ineffective, that it constituted duress, and against its results relief might be sought and obtained in a court of equity.

In the case of *Morse v. Woodworth*, 29 N. E. Rep. [Mass.], 525, it appeared that Morse had been book-keeper for Woodworth and was suspected, and probably guilty, of an embezzlement of money belonging to his employer, and by threats of prosecution and imprisonment a settlement was obtained from Morse for the money which he was accused of appropriating. The action was by Morse to, in effect, avoid such settlement. It was admitted that no criminal or civil proceedings had been commenced against him, and his right to avoid his acts rested upon the ground that the threats of imprisonment had moved him to make the settlement and constituted duress, and entitled him to have the settlement annulled. It was held: "Where defendant, by such threats of arrest and imprisonment as would overcome the mind and will of an ordinary man, compels a settlement which plaintiff would not have made voluntarily, plaintiff, even though guilty of the embezzlement, may avoid such settlement on the ground

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of duress;" and in the text of the opinion it is stated: "The question of law involved is whether one who believes, and has reason to believe, that another has committed a crime, and who, by threats of prosecution and imprisonment for the crime, overcomes the will of the other, and induces him to execute a contract which he would not have made voluntarily, can enforce the contract if the other attempts to avoid it on the ground of duress. Duress at the common law is of two kinds,—duress by imprisonment and duress by threats. Some of the definitions of duress *per minas* are not broad enough to include constraint by threats of imprisonment; but it is well settled that threats of unlawful imprisonment may be made the means of duress as well as threats of grievous bodily harm. * The rule as to duress *per minas* has now a broader application than formerly. It is founded on the principle that a contract rests on the free and voluntary action of the minds of the parties meeting in an agreement which is to be binding upon them. If an influence is exerted on one of them of such a kind as to overcome his will, and compel a formal assent to an undertaking when he does not really agree to it and make that appear to be his act, which is not his, but another's, imposed on him through fear which deprives him of self-control, there is no contract unless the other deals with him in good faith, in ignorance of the improper influence and in the belief that he is acting voluntarily. To set aside a contract for duress it must be shown first that the will of one of the parties was overcome, and that he was thus subjected to the power of another, and that the means used to induce him to act were of such a kind as would overcome the mind and will of an ordinary person. It has often been held that threats of civil suits and of ordinary proceedings against property are not enough, because ordinary persons do not cease to act voluntarily on account of such threats; but threats of imprisonment may be so violent and forceful as to have that effect. * * * A

contract obtained by duress of unlawful imprisonment is void, and if the imprisonment is under legal process, in regular form, it is nevertheless unlawful as against one who procured it improperly for the purpose of obtaining the execution of a contract, and a contract obtained by means of it is void for duress. So it has been said that imprisonment under a legal process issued for a just cause is duress that will avoid a contract if such imprisonment is unlawfully used to obtain the contract. (*Richardson v. Duncan*, 3 N. H., 508. See, also, *Foshay v. Ferguson*, 5 Hill [N. Y.], 154; *United States v. Huckabee*, 16 Wall. [U. S.], 414; *Miller v. Miller*, 68 Pa. St., 486; *Walbridge v. Arnold*, 21 Conn., 424.) It has sometimes been held that threats of imprisonment, to constitute duress, must be of unlawful imprisonment. But the question is whether the threat is of imprisonment which will be unlawful in reference to the conduct of the threatener who is seeking to obtain a contract by his threat. Imprisonment that is suffered through the execution of a threat, which was made for the purpose of forcing a guilty person to enter into a contract, may be lawful as against the authorities and the public, but unlawful against the threatener, when considered in reference to his effort to use for his private benefit processes provided for the protection of the public and the punishment of crime. One who has overcome the mind and will of another for his own advantage, under such circumstances, is guilty of a perversion and abuse of laws which were made for another purpose, and he is in no position to claim the advantage of a formal contract obtained in that way, on the ground that the rights of the parties are to be determined by their language and their overt acts without reference to the influences which moved them. In such a case there is no reason why one should be bound by a contract obtained by force, which in reality is not his but another's. We are aware that there are cases which tend to support the contention of the defend-

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ant. (*Harmon v. Harmon*, 61 Me., 227; *Bodine v. Morgan*, 37 N. J. Eq., 426; *Landa v. Obert*, 45 Tex., 539; *Knapp v. Hyde*, 60 Barb. [N. Y.], 80.) But we are of opinion that the view of the subject heretofore taken by this court, which we have followed in this opinion, rests on sound principles, and is in conformity with most of the recent decisions in such cases, both in England and America. (*Taylor v. Jaques*, 106 Mass., 291; *Hackett v. King*, 6 Allen [Mass.], 58; *Harris v. Carmody*, 131 Mass., 51; *Bryant v. Peck & Whipple Co.*, 154 Mass., 460; *William v. Bayley*, L. R., 1 H. L. [Eng. & Irish App.], 200, 4 Giff. [Eng.], 638, note; *Adams v. Irving Nat. Bank*, 116 N. Y., 606; *Eadie v. Slimmon*, 26 N. Y., 9; *Foley v. Greene*, 14 R. I., 618; *Town of Sharon v. Gager*, 46 Conn., 189; *Bane v. Detrick*, 52 Ill., 19; *Fay v. Oatley*, 6 Wis., 45.) We do not intimate that a note given in consideration of money embezzled from the payee can be avoided on the ground of duress, merely because the fear of arrest and imprisonment, if he failed to pay, was one of the inducements to the embezzler to make the note; but if the fact that he is liable to arrest and imprisonment is used as a threat to overcome his will, and compel a settlement which he would not have made voluntarily, the case is different. The question in every such case is whether his liability to imprisonment was used against him, by way of a threat, to force a settlement. If so, the use was improper and unlawful; and if the threats were such as would naturally overcome the mind and will of an ordinary man, and if they overcame his, he may avoid the settlement." (See, also, *Winfield Nat. Bank v. Croco*, 26 Pac. Rep. [Kan.], 939; *Morrison v. Faulkner*, 15 S. W. Rep. [Tex.], 797; *Morrill v. Nightingale*, 28 Pac. Rep. [Cal.], 1068; *Horton v. Bloedorn*, 37 Neb., 666; *Hullhorst v. Scharner*, 15 Neb., 57.)

The appellants had, prior to the date of the execution of the mortgage, procured the levy of an execution upon some

personal property belonging to the Korceks, and it was in the possession of the officer who levied the writ at the time the mortgage was made and delivered, and the appellants introduced testimony showing that they ordered the personal property released from the levy and returned to Korcek and that the officer, in compliance with such order, returned the chattels to Korcek; that it was part of the agreement at the time of the execution of the mortgage upon the real estate that the personalty should be released and returned to Korcek, and was a portion of the consideration for the signing and delivery of the instrument, and it is contended on behalf of appellants that before the appellees could claim the relief prayed for in the petition on the ground of duress, conceding it to have been sufficient to avoid the mortgage, it was incumbent upon them to show that the personal property which had been released from the levy by appellants and the lien of the execution had been returned or tendered to appellants, to be by them again subjected to a levy and regularly sold thereunder, and the proceeds applied in payment of their judgment, as they state was their intention and would have been done in the first instance had it not been released in accordance with the terms of the agreement with the Korceks as a part of the consideration for their mortgaging their homestead to appellants. Counsel for appellees contend that all evidence of the transaction in reference to the personal property and the levy of execution upon it and its release from the levy, etc., was incompetent, not being pleaded or raised in any manner by the pleading, or so connected with the issues as joined that it was competent or of any avail to appellants. However this may have been, the evidence on this point was conflicting and the trial court, if it considered the testimony competent, must have made a finding on this branch of the case in favor of the Korceks, and there was sufficient testimony to sustain such a finding, and we must conclude that there is nothing in this branch

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of the case which would warrant us in disturbing the finding and judgment of the trial court. The decree of the district court is

AFFIRMED.

RAGAN, C., not sitting.

44	672
145	212
44	672
49	695
50	423
44	672
57	516
57	518

**JOSEPH J. POUNDER ET AL., APPELLANTS, v. J. P. ASHE
ET AL., APPELLEES.**

FILED APRIL 5, 1895. No. 4973.

1. **Religious Societies: REGULARITY OF ECCLESIASTICAL PROCEEDINGS: REVIEW BY CIVIL COURTS.** Where a local church organization is a member of an association of congregations having a set of general rules for the government and conduct of all its members and officers and the orders and judgments of the association are binding upon the minor organizations or congregations composing it, its decisions, in so far as they relate exclusively to church affairs and government, are absolute and will be so regarded by legal tribunals.
2. ———: ———: ———. Courts which have no ecclesiastical jurisdiction will not review or revise the proceedings during trial by, or judgments of church tribunals, constituted by the organic laws of the church organization, where they involve solely questions of the church organization and discipline or infractions of the laws and ordinances enacted by its ruling body for the government of its officers and members.
3. ———: ———: **REMOVAL OF CLERGYMEN: REVIEW OF PROCEEDINGS: INJUNCTION.** Where charges have been preferred against a minister of the gospel, and he has been adjudged guilty by the highest tribunal of the church organization before which the matter has been presented, and deposed from the ministry and expelled from membership in the church, courts will recognize such judgments of the church tribunal and enforce their observance when regularly brought to their notice, and in an action for the purpose will enjoin the one against whom they were rendered from further acting in the capacity of a minister or enjoying the rights of a member of the particular church or

ganization, and will also enjoin such party and members of the local congregation or others who have combined with him from excluding from the church building and property and its use for any proper purpose, or from disturbing them in or during such use, parties, ministers appointed to take charge of the congregation and church, by the then, so far as the evidence in the case before the court discloses, recognized and appointive power, or in so excluding and disturbing a presiding elder of the church from or in its proper occupancy or use or any members in good standing who desire to worship therein in a regular manner and according to the established rules and ordinances of the church, where it further appears that the church property was conveyed to the organization or its trustees, for church purposes and in such a manner that it is subject to the control of the general association or governing power of the church and its rules and laws.

REHEARING of case reported in 36 Neb., 564.

Norval Bros. & Lowley, for appellants.

Ed. P. Smith, E. B. Esher, and E. C. Biggs, contra.

HARRISON, J.

The appellants commenced this action in the district court of Seward county, the object being to obtain an order of injunction restraining the appellees from interfering with or disturbing appellants in their use of a certain church building known as the Church of Mount Zion of the Beaver Crossing Mission of the Evangelical Association of North America, or their conducting religious exercises therein, and also restraining J. P. Ashe of defendants from officiating as minister at religious gatherings of the congregation in such church. There was a trial of the issues joined in the district court and a finding and judgment in favor of defendants, from which plaintiffs appealed to this court, and on hearing the judgment of the trial court was affirmed. A motion for rehearing was presented and granted. For a statement of the case we refer to the former opinion, reported in 36 Neb., 564. The decision of the controversy

hinges, in the main, upon the right of Mr. Ashe to remain in charge as clergyman or minister of the congregation at Beaver Crossing. The deed by which the lots upon which the church was situated was conveyed to the trustees of Zion church was introduced in evidence, and an examination of it shows that no person in particular can maintain any claim to its occupancy to the exclusion of others unless the right to do so be derived through the conference or governing bodies of the church organization, as it was conveyed to be used as a place of worship by the ministry and membership of the Evangelical Association of North America, which placed it entirely under the control and at the disposal of the ruling powers of the association. The discipline provides for the meeting of an annual conference and also a general conference, the first being held for, and having control and supervision over, the affairs of the association in what is designated a conference district, and the second to meet every four years for the whole association. Mr. Ashe had been assigned by an annual conference, as minister, to the performance of the church work at Beaver Crossing, and subsequently charges had been preferred against him and a trial had upon such charges, before a body called together and constituted as provided for in the discipline. He was notified of the time of trial and appeared before the court or investigating committee at the time appointed for the hearing and took some part in the proceedings, read what in the evidence is stated to have been a protest against the action then being taken, listened to a small portion of the testimony, and then withdrew. The committee adjudged him guilty and reported their action to the next annual conference, accompanying the report with the evidence and papers before them at the time of the trial. The annual conference made an examination of the matter as provided by the discipline and approved and ratified it. This action discharged him from the ministry and expelled him from the church. The discipline provided for

an appeal from the determination of the committee before which the trial took place to the annual conference, and also from the decision of the annual conference to the general conference, neither of which privileges was claimed or exercised by Mr. Ashe, he, evidently, having concluded to continue in the work of the ministry of Beaver Crossing, regardless of the action of either or both of these bodies, the committee and annual conference. The charges and specifications made against Mr. Ashe, and upon which he was tried and adjudged guilty by the committee, were as follows:

“BEAVER CROSSING, June 4, 1890.

“I, A. W. Shenberger, presiding elder of the Blue Springs district of the Platte river conference of the Ev. Association, do prefer charges against Rev. J. P. Ashe, for actions and sayings unbecoming a minister, and which has caused dissensions and disturbed the peace and harmony and prosperity of our society at Beaver Crossing.

“Specification A. In having certain resolutions passed by the board of trustees of the church which caused great dissatisfaction, which is contrary to the discipline.

“Specification B. In misrepresenting the interest and action of the Platte river conference, and especially at its last session, and the interest of the members of the society at Beaver Crossing, by intimidating on the finance.

“Specification C. In neglecting or refusing to observe our book of discipline as found on page 67, question 96, answer 2, also in answer 4, in lines 2 and 3, at the top of page 68, in book of discipline.

“A CHARGE FOR IGNORING HIS SUPERIOR IN OFFICE
AND DECEPTION.

“Specification A. On Monday, June 2, he told me that he did not recognize me as a presiding elder nor a member of the church since last conference. Same night in the church he said I was no elder and that he would not accept any charge from me.

The case of *Watson v. Avery*, 2 Bush [Ky.], 332, is cited in the former decision of the case at bar, and is undoubtedly a strong and leading case in support of the doctrine therein stated. Upon the controversy which was litigated in *Watson v. Avery*, with sufficient additions to the facts therein litigated afterwards made by the efforts in that behalf of the parties to the dispute to warrant the United States courts in hearing the questions involved, notwithstanding the plea of former adjudication in an opinion written by Mr. Justice Miller in the case of *Watson v. Jones*, reported in 13 Wall. [U. S.], 679, very strong ground was taken in favor of the contrary doctrine. It is said: "In this class of cases we think the rule of action which should govern the civil courts, founded in a broad and sound view of the relations of church and state under our system of laws, and supported by a preponderating weight of judicial authority, is that whenever the questions of discipline or of faith, or ecclesiastical rule, custom, or law, have been decided by the highest of these church judicatories to which the matter has been carried, the legal tribunals must accept such decisions as final, and as binding on them in their application to the case before them. We concede at the outset that the doctrine of the English courts is otherwise. * * * In this country the full and free right to entertain any religious belief, to practice any religious principle, and to teach any religious doctrine which does not violate the laws of morality and property, and which does not infringe personal rights, is conceded to all. The law knows no heresy and is committed to the support of no dogma, the establishment of no sect. The right to organize voluntary religious associations to assist in the expression and dissemination of any religious doctrine and to create tribunals for the decision of controverted questions of faith within the association and for the ecclesiastical government of all the individual members, congregations, and officers within the general association is unquestioned. All who unite them-

selves to such a body do so with an implied consent of this government and are bound to submit to it. But it would be a vain consent, and would lead to the total subversion of such religious bodies, if any one aggrieved by one of their decisions could appeal to the secular courts and have them reversed. It is of the essence of these religious unions and of their right to establish tribunals for the decision of questions arising among themselves that those decisions should be binding in all cases of ecclesiastical cognizance, subject only to such appeals as the organism itself provides for.

* * * But it is a very different thing where a subject-matter of dispute, strictly and purely ecclesiastical in its character, a matter over which the civil courts exercise no jurisdiction, a matter which concerns theological controversy, church discipline, ecclesiastical government, or the conformity of the members of the church to the standard of morals required of them, becomes the subject of its action. It may be said here also that no jurisdiction has been conferred on the tribunal to try the particular case before it, or that, in its judgment, it exceeds the powers conferred upon it, or that the laws of the church do not authorize the particular form of proceeding adopted, and in a sense often used in the courts; all of those may be said to be questions of jurisdiction. But it is easy to see that if the civil courts are to inquire into all these matters, the whole subject of the doctrinal theology, the usages and customs, the written laws and fundamental organization of every religious denomination may, and must, be examined into with minuteness and care, for they would become in almost every case the *criteria* by which the validity of the ecclesiastical decree would be determined in the civil court. This principle would deprive these bodies of the right of construing their own church laws, * * * and would in effect transfer to the civil courts, where property rights were concerned, the decision of all ecclesiastical questions."

In the *German Reformed Church v. Seibert*, 3 Pa. St.,

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291, the following language is used: "The decisions of ecclesiastical courts, like every other judicial tribunal, are final, as they are the best judges of what constitutes an offense against the word of God and the discipline of the church. Any other than those courts must be incompetent judges of matters of faith, discipline, and doctrine; and civil courts, if they should be so unwise as to attempt to supervise their judgments on matters which come within their jurisdiction, would only involve themselves in a sea of uncertainty and doubt which would do anything but improve either religion or good morals." (See, also, *Rike v. Floyd*, 6 O. Cir. Ct. Rep., 80; *Chase v. Cheney*, 58 Ill., 509, 11 Am. Rep., 95; *Shannon v. Frost*, 3 B. Mon. [Ky.], 258; *Nance v. Busby*, 15 L. R. A. [Tenn.], 801; *State v. Bibb Street Church*, 4 So. Rep. [Ala.], 40; *Landis v. Campbell*, 79 Mo., 433, 49 Am. Rep., 239; *Robertson v. Bullions*, 9 Barb. [N. Y.], 64; *Gaff v. Greer*, 88 Ind., 122; *White Lick Quarterly Meeting of Friends v. White Lick Quarterly Meeting of Friends*, 89 Ind., 136.)

The former decision herein is overruled, the judgment of the district court is reversed, and a decree entered in this court granting a perpetual injunction against the appellees.

DECREE ACCORDINGLY.

NORVAL, C. J., not sitting.

J. W. BINGHAM V. FRANK W. HARTLEY.

FILED APRIL 5, 1895. No. 5255.

Instructions: BURDEN OF PROOF: HARMLESS ERROR: REVIEW.

An instruction is not of necessity prejudicially erroneous because its meaning is obscure; and although therein the burden of proof is unintelligibly defined, a cause will not therefore be

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reversed when the record shows that another instruction was given which, with clearness, placed such burden upon the defendant in error.

ERROR from the district court of Colfax county. Tried below before SULLIVAN, J.

Phelps & Sabin, for plaintiff in error.

Grimison & Thomas, contra.

RYAN, C.

This action, brought by the defendant in error for the recovery of the amount of a board bill, was originally tried before a justice of the peace of Colfax county. Afterwards, an appeal having been taken to the district court of said county, there was rendered a judgment in favor of the defendant in error for the sum of \$84 on a verdict for the same amount. In the petition in error there are assigned with such distinctness as to entitle to consideration but two errors argued in the brief of plaintiff in error. The first of these is that the verdict is not sustained by sufficient evidence. A careful perusal of the bill of exceptions shows that this assignment is not well founded. The other assignment is directed against the ninth instruction given in the following language: "The burden of proof does not depend altogether, nor to any definite extent, upon the number of witnesses testifying for the respective parties, but rather upon the persuasiveness of the evidence furnished by such witnesses." It is highly probable that when the district judge wrote this instruction he had in mind a definite proposition which he intended to state with clearness. In this however, he failed. The jury from this instruction could have obtained no light as to the burden of proof. If the court intended in this instruction to state that the weight of the testimony on each side was dependent upon the conditions enumerated, the idea was quite correct. Probably the

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jury so understood the instruction, in which event no harm was done. Whether this is true or not it is scarcely possible that the jury could have acted under a mistaken understanding of the burden of proof, for, immediately following the above, there was a clear instruction that the burden of proving the reasonable value of the board and lodging was upon the plaintiff, and that there should, if the jury found for the plaintiff, be an allowance of such sum as by a preponderance of the evidence the board and lodging had been shown to be worth. Under these conditions we cannot believe that plaintiff in error was prejudiced by the giving of the instructions complained of, and the judgment of the district court is

AFFIRMED.

NELLIE B. WEEKS ET AL. V. PALMER DEPOSIT BANK.

FILED APRIL 5, 1895. No. 5476.

Partnership: EVIDENCE OF MEMBERSHIP. Where it was sought to hold the defendant liable as a member of a partnership firm, the mere statements, of one who claimed to be acting for, and as a member of, said firm were not competent to establish the disputed partnership relation.

ERROR from the district court of Merrick county. Tried below before MARSHALL, J.

John Patterson and Webster & White, for plaintiffs in error.

Webster, Rose & Fisher and *Meiklejohn & Thompson*, contra.

RYAN, C.

This action was brought in the Merrick county district court by the Palmer Deposit Bank against James C. Weeks

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and Nellie B. Weeks on certain guaranties of notes signed by Weeks & Co. James C. Weeks made no defense. By Nellie B. Weeks the contention was that she was not a member of the firm of Weeks & Co. at the time the aforesaid guaranties were made, and that this fact was known to the said banking firm. She had been, without question, a member of the firm of Weeks & Co. while that firm transacted a mercantile business at Palmer, which was from some time in 1887 until about the first of March, 1888. About the date last named the stock at Palmer was closed out and James C. Weeks opened another store at Cushing, and there conducted a merchandising business under the name of Weeks & Co., and, while doing so, transferred to the aforesaid bank certain promissory notes on each of which there was a written guaranty signed "Weeks & Co." On a trial had there was a verdict against Nellie B. Weeks for \$196.93, on which judgment was duly rendered. To reverse this judgment she prosecutes error proceedings to this court.

The evidence tending to establish the liability of Mrs. Weeks upon the above guaranty was not very direct. It was shown that she was a member of the firm of Weeks & Co. while that firm was in business in Palmer; that the husband of Nellie B. Weeks and herself constituted the firm of Weeks & Co. at Palmer, where the business was managed for the most part by James C. Weeks. When this store was opened at Cushing there was no change in the manner of keeping the account of Weeks & Co. with the defendant in error. James C. Weeks made deposits to the credit of Weeks & Co. and drew money on checks signed Weeks & Co. by him.

W. C. Batty, a member of the banking firm doing business under the name of the Palmer Deposit Bank, was examined as a witness and testified that the reasons that the said bank had for believing that Mrs. Weeks was a member of the firm of Weeks & Co. at Cushing were, as the

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witness expressed it: "The representation they made when they came to Palmer to us as Weeks & Co., of which I have spoken, and the fact that the stock was moved from Palmer from Weeks & Co.'s store at Palmer to Weeks & Co.'s store at Cushing, and the fact we had never received any notice of dissolution, account kept in the same way, deposits came down by express, they borrowed money the same way as Weeks & Co., the notes Mrs. Weeks signed as she had the Palmer business, they in that way held out every representation they were Weeks & Co."

Mrs. Weeks in her testimony denied that the firm of which she had been a member at Palmer removed any portion of its stock to Cushing; denied that she had any knowledge of money being borrowed by Weeks & Co. for its business at Cushing; denied that she knew that an account was still kept with the bank in the name of Weeks & Co., and, in general, it may be said, denied that she was a member of a firm of Weeks & Co. at Cushing, or had ever done or knowingly permitted anything to be done which would countenance that idea. For the purpose of showing that in fact Mrs. Weeks was a member of the firm of Weeks & Co. in its business at Cushing there were permitted to go in evidence, over proper objections, three letters written by James C. Weeks without the knowledge or assent of his wife, as we must assume, for she so testified, and there was no attempt on this point to offer contradictory evidence of any character. These letters were as follows:

"CUSHING, NEB., May 31, 1888.

"*Hargreaves Bros., Lincoln, Neb.*—GENTLEMEN: Inclosed find our check No. 268, for invoice March 31st in full, \$38.18. Please credit same and oblige,

"Yours truly,

WEEKS & Co."

"PALMER, NEB., August 20, 1888.

"*Burdett, Smith & Co., Chicago, Ill.*—GENTLEMEN: Yours of August 16th to hand, and in reply will say you

can ship us the pattern 88. Weeks & Co. of Cushing and Palmer are as one. The Cushing store is a branch of Palmer store.

"Yours truly,

WEEKS & Co."

"PALMER, NEB., May 7, 1888.

"*Hargreaves Bros., Lincoln, Neb.*—GENTLEMEN: Please ship us to our store at Cushing one medium sized bunch bananas, and oblige,

"Yours truly,

WEEKS & Co."

There is no pretense that the above letters in any way influenced the bank in extending credit to Weeks & Co. at Cushing, or that their existence was ever known to said bank. The letters, therefore, if at all competent, were admissible, because they afforded direct evidence that Mrs. Weeks was in fact a partner in the business being carried on at Cushing. The rule applicable is thus stated in *Converse v. Shambaugh*, 4 Neb., 376: "When the existence of the partnership is admitted or otherwise established, the admission of one of the partners as to any matter between the firm and another party is to be received as evidence against all the partners. But where the existence of the partnership is denied and there is proof to establish its existence, then the admission of a party that he is a partner affects him alone and such admission is no evidence of the existence of the partnership so as to create a liability against the others. (*McPherson v. Rathbone*, 7 Wend. [N. Y.], 216; *Nelson v. Lloyd*, 9 Watts [Pa.], 22; *Cottrill v. Vanduzen*, 22 Vt., 511.)" In *McCann v. McDonald*, 7 Neb., 305, it was held that the statement of one claiming to be a partner, as to who were partners, bound no one but himself in the absence of independent proof of the existence of the partnership relation. The same rule governs as does where the question involved is whether or not one who purports to speak for another is in fact his agent. In *Norstrum v. Halliday*, 39 Neb., 828, it was said: "The testimony of the agent, where not upon other grounds incompetent,

ERROR from the district court of Nance county. Tried below before SULLIVAN, J.

N. C. Pratt, for plaintiff in error.

M. V. Moudy, *contra*.

RYAN, C.

By virtue of an execution issued for the satisfaction of a judgment against Thomas Apgar, the sheriff of Nance county levied upon 437 bushels of oats in a bin situated upon the farm of Apgar. These oats were replevied from the sheriff by Oakley E. Green, to whom, while said oats were growing in the field, they had been mortgaged. At the time the execution was levied the officer who held it was notified of the existence of the aforesaid mortgage, nevertheless he refused to yield possession of the property. In accordance with the express direction of the district court of Nance county so to find there was a verdict for plaintiff in that court. Judgment having been duly rendered thereon, the defendant prosecutes error proceedings for the reversal of the aforesaid judgment.

In the brief submitted by plaintiff in error it is stated that there is involved only one question, and that a question of law. As the discussion proceeds, however, it seems to develop three closely related propositions of fact, rather than law, which shall now receive attention in the order in which they occur. It is first insisted that, as the mortgage was on "thirty-five acres of growing oats," etc., this description was inoperative as against oats afterwards placed in a bin. The evidence left no doubt, however, as to the oats in the bin on the farm whereon the crop was grown being a part of the oats which were growing when the mortgage was executed. The question involved was simply one of identity, which the evidence precluded being settled otherwise than as it was. As to the presumption

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which arises from the failure to take and hold continuous possession of the mortgaged property under the provisions of section 11, chapter 32, Compiled Statutes, it is necessary only to state that the evidence showed that the mortgage was made in good faith and without fraudulent intent, in the absence of any attempt to establish the contrary. This being true, the presumption indicated was overcome. (*Davis v. Scott*, 22 Neb., 154.) It is next urged the mortgage was upon a portion of the oats growing, and that, therefore, the mortgage was void for uncertainty. If this was correct, there would be presented a question of law; but such is not the case. The mortgage covered thirty-five acres of growing oats, and there is no question made that there were more than that number of acres of oats on the farm of Mr. Apgar. The levy was on 437 bushels in a bin. Probably these oats were but a part of what grew on the entire tract, yet this fact has no tendency to render invalid a mortgage upon all the oats that had previously been growing. The judgment of the district court is

AFFIRMED.

CHICAGO, ROCK ISLAND & PACIFIC RAILWAY COMPANY V. A. K. GRIFFITH ET AL.

FILED APRIL 5, 1895. No. 6285.

1. Witnesses: EMINENT DOMAIN: EVIDENCE OF DAMAGE.

While it is not competent to show the price at which other property has been sold for the purpose of proving the value of that taken for railroad purposes, yet if, on cross-examination of witnesses for the adverse party, the railroad company adopts that line of inquiry, error will not be presumed from a re-examination confined to such line followed on cross-examination.

2. Eminent Domain: EVIDENCE OF DAMAGE: REVIEW. Error cannot be predicated upon the mere fact that witnesses under examination as to the value of several lots in the same immediate

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neighborhood in arriving at their value estimated that of one class, then, having considered wherein that class differed from another, qualified their estimates of the value of the latter class by taking into consideration the cost of removing such difference when such removal was by such witnesses deemed practicable and advisable.

3. Review: AFFIDAVIT FOR NEW TRIAL: BILL OF EXCEPTIONS.

An affidavit in support of a motion for a new trial, to be available on error, must be embodied in a bill of exceptions, and alleged errors not excepted to will not be considered.

ERROR from the district court of Lancaster county.
Tried below before STRODE, J.

The facts are stated by the commissioner.

L. W. Billingsley and *R. J. Greene*, for plaintiff in error:

The measure of damages is the market value of the land at the time and in the condition it was taken. Testimony in conflict with this rule is inadmissible. (*Blakeley v. Chicago, K. & N. R. Co.*, 25 Neb., 207; *Republican Valley R. Co. v. Arnold*, 13 Neb., 485; *Harris v. Schuylkill R. E. S. R. Co.*, 21 Atl. Rep. [Pa.], 590; *Louisville & N. R. Co. v. Ingram*, 14 S. W. Rep. [Ky.], 534; *Louisville & N. R. Co. v. Asher*, 15 S. W. Rep. [Ky.], 517; *San Francisco & N. P. R. Co. v. Taylor*, 24 Pac. Rep. [Cal.], 1027; *Central P. R. Co. v. Pearson*, 35 Cal., 247; *Spokane & P. R. Co. v. Lieuallen*, 29 Pac. Rep. [Idaho], 854; *Lewis, Eminent Domain*, sec. 499; *Omaha B. R. Co. v. McDermott*, 25 Neb., 715; *Marsh v. Snyder*, 14 Neb., 237; *State Historical Association v. City of Lincoln*, 14 Neb., 336; *First Nat. Bank v. Carson*, 30 Neb., 108; *McCartney v. Territory of Nebraska*, 1 Neb., 121; *McGean v. Manhattan R. Co.*, 22 N. E. Rep. [N. Y.], 957; *Lawrence v. Metropolitan E. R. Co.*, 8 N. Y. Sup., 326; *Sherlock v. Chicago, B. & Q. R. Co.*, 130 Ill., 403.)

There is no presumption that a witness is competent to

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give a reliable estimate of the market value of land. There should be a showing of his knowledge of values. (*Missouri P. R. Co. v. Coon*, 15 Neb., 233; *Republican Valley R. Co. v. Arnold*, 13 Neb., 485; *Fremont, E. & M. V. R. Co. v. Whalen*, 11 Neb., 587.)

Adams & Scott, contra, as to the measure of damages and the methods of determining the amount, cited: *Boom Co. v. Patterson*, 98 U. S., 403; *Providence & W. R. Co. v. City of Worcester*, 26 N. E. Rep. [Mass.], 59; *Commissioners of Parks & Boulevards v. Moesta*, 51 N. W. Rep. [Mich.], 903; *Colorado M. R. Co. v. Brown*, 15 Col., 193; *Louisville, N. O. & T. R. Co. v. Ryan*, 64 Miss., 399; *Watson v. Milwaukee & M. R. Co.*, 57 Wis., 332; *King v. Minneapolis U. R. Co.*, 32 Minn., 224; *St. Louis, J. & S. R. Co., v. Kirby*, 10 Am. & Eng. R. Cases [Ill.], 214; *Kansas City & S. W. R. Co. v. Baird*, 21 Pac. Rep. [Kan.], 227; *Fremont, E. & M. V. R. Co. v. Meeker*, 28 Neb., 97.

As to admissibility of evidence and examination of witnesses the following authorities were cited: *Somerville & E. R. Co. v. Doughty*, 22 N. J. Law., 495; *Jaspers v. Lano*, 17 Minn., 296; *Schlencker v. State*, 9 Neb., 241; *Carr v. Moore*, 41 N. H., 131; *Blewett v. Tregonning*, 3 Ad. & El. [Eng.], 554; *Greville v. Chapman*, 5 Q. B. [Eng.], 731; *Donnelly v. State*, 26 N. J. Law., 463; *Wyman v. Lexington & W. C. R. Co.*, 54 Mass., 316; *Spring Valley Water-Works v. Drinkhouse*, 28 Pac. Rep. [Cal.], 682; *Northeastern N. R. Co. v. Frazier*, 25 Neb., 53; *Burlington & M. R. Co. v. Schluntz*, 14 Neb., 421; *Sioux City & P. R. Co. v. Weimer*, 16 Neb., 272.

Affidavits used in evidence below will not be considered in the appellate court when not preserved by a bill of exceptions. (*City of Plattsmouth v. Boeck*, 32 Neb., 299; *Strunk v. State*, 31 Neb., 119; *McCarn v. Cooley*, 30 Neb., 552; *Burke v. Pepper*, 29 Neb., 320; *Ray v. Mason*, 6 Neb., 101; *Barton v. McKay*, 36 Neb., 632.)

RYAN, C.

Error proceedings in this case are prosecuted to reverse a judgment of the district court of Lancaster county. Originally, on the application of the plaintiff in error, there was an award of damages caused by taking certain lots of the defendants in error situated in Saulsbury Addition to the city of Lincoln. This award was unsatisfactory to the defendants in error, and they appealed to the aforesaid district court, wherein, upon a trial had, the award was considerably increased. Such errors only as are deemed essential will receive consideration, and these as briefly as possible.

A. K. Griffith, one of the defendants in error, in his testimony described the property in Saulsbury Addition which had been appropriated by the railroad company, as well as its location, and gave his estimate of its value before its appropriation. This was limited to such lots as were owned by the defendants in error. On cross-examination this witness testified as follows:

Q. Before the railroad was projected through there, and before its coming had any influence upon the market value of property there, do you know of any sales being made in that neighborhood?

A. Oh, yes.

Q. Where?

A. On Seventeenth street there.

Q. North of Vine?

A. North of Vine; yes, sir.

Q. How far from your property?

A. About 100 feet—something over 100 feet.

Q. How far did these lay from Vine street?

A. I don't know exactly which lots it was. I knew of a couple of lots selling in there, probably 300 or 400 feet from Vine.

Q. Who sold them?

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A. Tom Beach sold one, and I forget who else.

Q. What month did Tom Beach sell?

A. I don't know the month.

Q. Will you swear it was in 1892?

A. No, I would not.

Q. Will you swear it was in 1891?

A. I feel pretty sure, but I wouldn't swear.

Q. What was the size of that lot?

A. Those lots were 50 by 175 feet.

Q. Was the lot you speak of Beach selling a vacant lot?

A. Yes, sir.

Q. What did he get?

A. I don't know exactly; about a thousand dollars, I think.

Q. That was 50 by 175?

A. I would not say positively, I think it was though.

Q. That is the size you gave?

A. That is the size I think it was.

On redirect examination there was answered the following question under objections as indicated, to-wit:

Q. In answer to some questions of Mr. Wilson's, Mr. Griffith, you said you knew of some other lots selling over there—Beach's lots. What did they sell for, if you know?

Objected to, as incompetent, irrelevant, and immaterial, and the evidence now shows that the Beach lots were purchased by the defendant for the purpose of the location of their railroad. Overruled. Exception.

A. The lowest price and lot sold for on that alley, 25 by 95 feet they were, was \$300 from that up.

When this question and answer were first considered it appeared to us that the court erred in its ruling, for it was immaterial what had been paid for other lots, and evidence to that effect seemed incompetent. The fact that this testimony was elicited on re-examination was not alone suffi-

cient to render it competent, for it was directed to the establishment of an essential fact, upon the existence of which plaintiff's right of recovery depended; that is, the value of the land of plaintiffs which had been appropriated to the use of the railroad company. What was the market value of the particular property taken from defendants in error was an important question in this case. (*Blakely v. Chicago, K. & N. R. Co.*, 25 Neb., 212; *Omaha Belt R. Co. v. McDermott*, 25 Neb., 715.) The question asked and answered had reference to the value of other property, —a consideration entirely foreign to that just stated. A more critical analysis of the cross-examination of Mr. Griffith, however, disclosed the fact that therein he had been asked what Mr. Beach got for a lot, and he had answered \$1,000. It is possible that this use of the word "lot" may have been with reference to a tract as distinguished from a technically designated city lot. On cross-examination the price received by Mr. Beach was described as \$1,000. On re-examination the lowest price of any lot sold was given as \$300; "they were from that on up," said the witness. Thus the railroad company had shown a valuation of \$1,000 on a single lot, while by the re-examination of Mr. Griffith no sale had been shown for a figure given in excess of \$300. If, as has been already suggested, this \$1,000 for a vacant lot referred to a tract (perhaps greater in area than a city lot), we are not at all justified thereby in assuming that the admission of the evidence noted on re-examination was prejudicial to the railroad company. The existence of such prejudice is rendered still more problematical by a consideration of the cross-examination of Mr. Griffith, which followed his re-examination above noted, which cross-examination was as follows:

Q. You say the lowest of them was sold for \$300?

A. That is the lowest price I heard.

Q. Why didn't you state that all that sold above \$300 had improvements on?

A. All that sold above \$300 did not have improvements on.

Q. Which one did not?

A. Those on the south side—Prof. Little's lots.

Q. You were not asked about Little's lots. You were asked about Beach's lots. Why didn't you say all the rest of Beach's lots had improvements on them? You were willing for this jury to think, from your testimony, that some of Beach's lots, without improvements on them, sold for more than \$300?

A. Yes, sir.

Q. Where are they?

A. I pointed them out as near as I could.

Q. On the Beach addition?

A. Maybe I didn't understand your question.

Q. Were any lots in Beach's addition sold for more than \$300 without improvements on them?

A. No.

Q. Then why did you say \$300 was the lowest price?

A. I will tell you why. There were several sold in there that had what they called improvements on them. They had a shanty on them that he couldn't sell for \$1. They sold for \$500.

In view of the confusion as to the sale of these Beach lots, as illustrated by all of the above quotations from the testimony of Mr. Griffith, we cannot now say that his re-examination was prejudicial error.

In regard to other evidence of Mr. Griffith there is presented a question quite similar to that just considered. On his cross-examination he was asked by counsel for the railroad company what he paid in 1889 for the property appropriated. His answer was as follows:

I gave as good a quarter section as is in the county, and they got \$500 to boot, and since that I have paid out over \$2,000.

Q. With whom did you trade?

A. Billy McLaughlin, and I thought I got it awful cheap.

On redirect examination Mr. Griffith testified that the \$2,000 expended was to get Eighteenth street through; that is, was paid for property necessary to give him an outlet. He was then asked what was the value of the quarter section above referred to when he made the exchange for the property appropriated by the railroad company. This was objected to as incompetent, irrelevant, and immaterial, and because no foundation had been laid for its introduction. These objections were overruled, and exceptions taken thereto, after which the witness answered that it was worth \$45 per acre. In the first instance it would not have been competent for Mr. Griffith to show what he paid for this property as furnishing a basis for an estimate of its value. (*Dietrichs v. Lincoln & N. W. R. Co.*, 12 Neb., 225; *Omaha S. R. Co. v. Todd*, 39 Neb., 818.) It was, however, proper for counsel for the railroad company to ask this, for the purpose of showing that while Mr. Griffith now claimed its value to be very great, he had in fact but recently obtained it for a comparatively small consideration. The tendency of the evidence of the character elicited on cross-examination was to dispute the claims of Mr. Griffith and discredit his testimony as to the real value of the property which he had acquired. The mere fact that he had exchanged property of an uncertain value for that appropriated left it open to argument as to whether or not his present claims and testimony were inconsistent with the actual consideration really paid. To remove this uncertainty it was proper to show on a re-examination of this witness after this aforesaid cross-examination what was the actual value of that part of the consideration paid in property. This did not sanction the introduction of testimony of this character for the purpose of reinforcing the direct evidence of this party in making his case originally. It was admissible solely because an

opening, and, perhaps necessity for it, had been created by cross-examination.

There appears in the transcript of the pleadings in this case an affidavit of J. E. Philpott, who acted as counsel for the railroad company, to the effect that while affiant was in the court room the jury in this case came in and, in the language of the affiant, "asked the court to have the reporter read that part of the evidence in said case as to whether Griffith paid \$500 in the trade of the farm for the lots in question, or the purchaser paid Griffith \$500 in the trade, and such part of the evidence was by order of the court read to the jury and the jury thereupon retired to the jury room." From the fact that the reading of evidence by the reporter to the jury relative to payment of \$500 was the subject-matter of the twenty-seventh ground urged for a new trial we are at liberty to assume that this affidavit may have been attached to said motion. It is not now available, for two sufficient reasons, one of which is that no exception was taken to this action of the court by Mr. Philpott; the other is that this affidavit was not made part of a bill of exceptions. The judge who presided at the trial certified that the bill of exceptions presented by the railroad company's attorney contained all the evidence offered. The above affidavit not appearing in it, must therefore be assumed not to have been used for any purpose.

It was shown by the evidence that a portion of the lots appropriated were quite level, and that through others there was a draw, or a depression of a portion of the surface, by reason of which fact alone those in the latter class were not as valuable as those in the former. Different witnesses for the defendants in error, in the course of their examination, gave their estimates of the value of those lots which were level, and in speaking of those not in that class said they were as valuable if the draw or depression referred to was filled up, and in this connection there was given testimony as to what would be the probable cost of

this filling. It is quite evident that the means of knowledge of some who made estimates of this kind were quite limited. It might not have been improper to exclude their estimates, and yet we cannot say that this was the imperative duty of the district court. This method of comparison was not improper, for it is probable that very few pieces of property will be found the exact counterparts of others. Where the witnesses explain, as they did in this case, wherein the difference lies, and give their estimates of what it would cost to make one like the other when they deem this advisable and practicable, we see no impropriety in permitting this to be done. The trial court is not bound to do this, indeed there might be such an abuse of this method of making comparative estimates that prejudicial error must be inferred. In this case no such condition of affairs exists, for the witnesses, having first given their estimates of the value of the property, on further examination showed merely how they made their estimates. As is usual, where the real value of property is under consideration, there was a want of uniformity in valuations placed upon the property appropriated. The verdict, however, had the support of sufficient evidence to sustain it and will not be disturbed as lacking support of proof, sanctioned as it has been by the overruling of a motion for a new trial in which was presented that question. The judgment of the district court is

AFFIRMED.

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852	91

JOHN H. FELBER, APPELLEE, V. BEDFORD B. BOYD,
APPELLANT.

FILED APRIL 5, 1895. No. 7378.

Alteration of Transcript: DISMISSAL OF APPEAL. The motion of appellee to strike from the files of this court the transcript filed herein sustained, because it appears (1) that the appellant has not brought to this court and filed here a certified transcript of the proceedings in the district court as the same appear of record in the office of the clerk of said court; (2) that the certificate of the clerk of the district court attached to the record brought here has been materially altered since it was made, with the evident intention of misleading and deceiving this court.

MOTION by appellee to quash the transcript of appeal from a decree of the district court of Cedar county on the ground that the certificate of the clerk has been altered.
Motion sustained.

No briefs filed.

J. C. Robinson and Wilbur F. Bryant, for the motion.

Bedford B. Boyd and William Leese, contra.

RAGAN, C.

This case is before us on three motions. The first is to quash the bill of exceptions. There is no merit in this motion and it is accordingly overruled without discussion. The second motion suggests a diminution of the record. It would subserve no useful purpose to set forth the grounds on which this motion is based, nor our reasons for denying it, and it is accordingly overruled. The third is a motion to strike from the files of this court what purports to be a certified copy of the record of this case made by the clerk of the district court of Cedar county, where the case was

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tried and from which it has been appealed. The ground on which the motion is based is that the certificate made and attached to the record brought here by the clerk of the district court of Cedar county, since such certificate was made, has been changed.

The facts alleged in the motion are established by affidavits filed in support thereof. The certificate of the clerk, as originally made, was in words and figures as follows:

“CERTIFICATE OF TRANSCRIPT.

“THE STATE OF NEBRASKA, }
THE COUNTY OF CEDAR. } ss.

“I, John J. Goebel, clerk of the district court in and for said county and state, do hereby certify that the within and foregoing is a true and correct copy of all of the pleadings in the case of John H. Felber against Bedford B. Boyd, as the same are on file and of record in my office, and all of the journal entries, except a copy of the last journal entry included in the transcript, which is not recorded, but only one of the files of the case, for, according to the rules of said court, the same was not accepted by the plaintiff and could not be recorded.

“Given under my hand and official seal, this 23d day of November, in the year of our Lord one thousand eight hundred and ninety-four.

“[SEAL.]

JOHN J. GOEBEL,

“*Clerk of the District Court.*”

It appears from the evidence introduced in support of the motion to quash this transcript that rule 16 of the district court of Cedar county provides: “An attorney who drafts a journal entry shall submit the same to an attorney of the opposite party for approval, rejection, or modification before the clerk places the same on the journal. If such attorneys cannot agree upon the journal entry to be made, the same shall be settled by the judge.”

There has also been transmitted here and used in the hearing of this motion a duly certified transcript of the de-

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cree rendered and all the orders made by the district court in this action, as the same are of record on the district court journals of said Cedar county. From this certified transcript we take the following from the decree of the court:

"It appearing that the counsel cannot agree upon a journal entry for last term, under the rules of the court, and the defendant having drawn a journal entry unsatisfactory to the court, it is ordered that the counsel for the plaintiff prepare a journal entry to be submitted to the judge of this court for approval. W. F. NORRIS,

"Judge."

It appears that in accordance with that order that counsel for the plaintiff (the appellee) prepared the journal entry or decree in the case and submitted it to the judge. It was approved by him and made by the clerk a part of the complete record of the case. It also appears that counsel for the appellant filed with the clerk or placed among the files in this case in the clerk's office the "unsatisfactory journal entry" mentioned above by the judge, and that a copy of this "unsatisfactory journal entry" or decree is the one which the appellant has incorporated into the record brought here, and is the journal entry or decree alluded to by the clerk in his certificate in this language, "except a copy of the last journal entry included in the transcript, which is not recorded, but only one of the files in the case, for, according to the rules of said court, the same was not accepted by the plaintiff and could not be recorded." The alteration of the certificate of the clerk complained of consists of interlineations and erasures as follows: In that part of the certificate last above quoted some one has erased with a pen and ink the following words, "but, only, one, of the, for, rules, of said court, the same was not accepted by the plaintiff and could not be recorded," and has interlined with a pen and ink the following words: "only one of the." So that the certificate now reads as follows: "The

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within and foregoing is a true and correct copy of all the pleadings in the case, * * * as the same are on file and of record in my office, and of all the journal entries, except a copy of the last journal entry included in the transcript, which is not recorded; only one of the files in the case according to the rules." In other words, the clerk certified that the transcript brought here by appellant contained a correct copy of all the pleadings in the case on appeal and of record in his office and a correct copy of all the journal entries, except that which purported to be the decree in the case, was, under the rules of the court, not the decree, had not been accepted as such, and was not of record; and the certificate, as changed, makes the clerk certify that this record contains a certified copy of all the pleadings in the case except that the decree in the transcript had not been recorded and remained a file in the case according to the rules of the court. To sum up the matter, it appears: (1) that the appellant has not brought to this court and filed here a certified transcript of the proceedings of the district court of Cedar county in this case, as the same appear of record in the office of the clerk of the district court of said county; (2) that the certificate of the clerk of the district court attached to the record brought here has been materially changed, since it was made with the evident intention of misleading and deceiving this court. We cannot tolerate conduct like this. The motion is sustained, the transcript quashed, and the entire proceeding is dismissed out of this court.

APPEAL DISMISSED.

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CITY OF HASTINGS V. JOSEPH H. HANSEN.

FILED APRIL 5, 1895. No. 6123.

1. **Municipal Corporations: BOUNDARIES.** What the boundaries of a municipal corporation are, where they are, and whether a particular piece of territory lies within or without the corporate limits of a municipality, are all matters for judicial determination; but the power to create municipal corporations and the power to enlarge or restrict their boundaries is a legislative one.
2. ———: ———: **POWER OF COURTS.** In the absence of express statutory authority, the courts of this state possess no jurisdiction to disconnect by decree any part of the territory of a municipal corporation at the suit of the owner of such territory.
3. ———: **DISCONNECTION OF TERRITORY: CONSTRUCTION OF STATUTE.** Section 101, chapter 14, Compiled Statutes, construed, and held, that the provisions of said section are not applicable to cities of the first class having less than twenty-five thousand inhabitants.

ERROR from the district court of Adams county. Tried below before BEALL, J.

Tibbets, Morey & Ferris, for plaintiff in error:

The power of the legislature over municipal boundaries is absolute and no inferior body has power to act, unless specially delegated by the legislature. (15 Am. & Eng. Ency. Law, 1002, 1003, 1023; Boone, Corporations, sec. 285; Dillon, Municipal Corporations [4th ed.], secs. 182, 183, 185; *City of Wahoo v. Dickinson*, 23 Neb., 430; *Maddrey v. Cox*, 11 S. W. Rep. [Tex.], 541.)

F. P. Olmstead, contra.

RAGAN, C.

On the 28th day of May, 1892, Joseph H. Hansen brought suit in equity in the district court of Adams

county against the city of Hastings. In this petition he alleged, in substance, that he was the sole owner and occupant of a sixty-acre tract of land included within the corporate limits of said city, and situated upon the border and within the boundary of said city; that said land had been within said city limits since the year 1886; that no part of said tract of land had ever been laid out into lots; that said land was too remote to be of use for city residence lots, and could not be used profitably for any other purpose than that of farming; that he had continuously occupied and cultivated said tract of land as his homestead since the year 1872, on which last date he pre-empted it under the laws of congress; that no public convenience or advantage, either of police, sanitary, or commercial interest, required that the corporate limits of said city should extend over said land, and that it was inequitable that said real estate should be subject to city taxes. The prayer of the petition was for a decree disconnecting said tract of land from the corporate limits of said city. To this petition the city interposed a general demurrer, which the district court overruled. The city electing to stand on its demurrer, the court entered a decree as prayed for in the petition, and the city has prosecuted error.

This action is based on section 101, chapter 14, Compiled Statutes, 1893, which reads as follows: "Whenever a majority of the legal voters of any territory within any city or village, and being upon the border and within the boundary thereof, shall petition the district court of the county in which said city or village is situated, praying to be disconnected therefrom, such petition shall be filed with the clerk of the court at least ten days prior to the first day of the term at which it is proposed to be held, and like proceedings shall be had thereon," etc. This section is section 101 of an act entitled "An act to provide for the organization, government, and powers of cities and villages," and which went into effect on the 1st day of September, 1879.

By the first section of that act all cities, towns, and villages in the state which contained more than fifteen hundred and less than fifteen thousand inhabitants were denominated cities of the second class. This first section was amended by the legislature February 14, 1881, so as to make all cities, towns, and villages containing more than fifteen hundred and less than twenty-five thousand inhabitants cities of the second class. The act of 1881 was again amended by the legislature on March 5, 1885, making all cities, towns, and villages containing more than one thousand and less than twenty-five thousand inhabitants cities of the second class. The plaintiff in error is not and was not governed by the said act of 1879 and its amendments at the time of the bringing of this action, and the provisions of said section 101 are applicable, and applicable only, to cities, towns, and villages containing more than one thousand and less than twenty-five thousand inhabitants which are denominated by said act of 1879 cities of the second class.

The legislature, by an act passed and approved March 14, 1889, created all cities in the state containing less than twenty-five thousand and more than eight thousand inhabitants into cities by the name "cities of the first class having less than twenty-five thousand inhabitants." By virtue of this act and its amendments the appellant became a city of the first class having less than twenty-five thousand inhabitants, and was such a city at the time of the bringing of this action. The said act of 1889 provided that the corporate limits of the new class of cities created thereby should remain as they existed theretofore, and neither said act, nor any of its amendments, contains any provision by which territory within the corporate limits of any such city can be disconnected by a decree of court at the suit of the owner or owners of such territory. What the boundaries of a municipal corporation are, where they are, and consequently whether a particular piece of territory lies within

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or without the corporate limits of a municipality, are all matters for judicial determination; but the power to create municipal corporations and the power to enlarge or restrict their boundaries are legislative powers; and it has been doubted if the legislature can pass a valid act giving the courts jurisdiction to disconnect by decree any part of the territory of a municipal corporation of the state merely at the suit of the owner thereof. However this may be, it is quite clear that the courts possess no such power independently of express statute. Since the statute on which this action is based is not applicable to cities of the class to which plaintiff in error belongs, it follows that the court was without jurisdiction to enter a decree disconnecting the property of the defendant in error from the territory of the plaintiff in error. The decree of the district court is reversed and the action dismissed.

REVERSED AND DISMISSED.

ELIZABETH ELLSWORTH V. ELMER E. MCDOWELL,
ADMINISTRATOR.

FILED APRIL 5, 1895. No. 5340.

Vendor and Vendee: CONTRACTS: DEFAULT-POSSESSION: TRESPASS: REPLEVIN: BUILDINGS. By the terms of a written contract between Champlin and Tschannen the former agreed to sell and convey certain real estate to the latter on his making certain payments. The contract provided that Tschannen's failure to make any one of the payments at its maturity should entitle Champlin to the immediate possession of the real estate. Tschannen took possession of the premises and built a frame house thereon, in which he and his family took up their residence. Tschannen made default in the payments promised. At a time when Tschannen was absent from home, but while his family and household goods were in the house, Champlin caused a workman to go upon the premises, without the knowledge of

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consent of Tschannen, and erect a foundation under the house. Tschannen then sold the house to his mother-in-law, then residing with him therein, and she removed it to an adjoining lot, and with her family was residing therein when Champlin replevied the house and called the sheriff to remove it back to the lot on which it was originally erected, the mother-in-law and family remaining therein during and after the transit. *Held*, (1) That Champlin, in causing the workman to go upon the premises and put a foundation under the house, did not by such act acquire possession of said house; (2) that by said act Champlin was guilty of trespass, and whatever possession of the house he acquired thereby was wrongful; (3) that possession of property obtained by trespass cannot be made the basis of an action of replevin for the possession of such property; (4) that Tschannen's default in making the payments promised did not authorize Champlin to retake possession of the premises with force and arms; (5) that the provision in the contract that if Tschannen made default in his payments Champlin should be entitled to the immediate possession of the premises meant no more than that such default should confer a right of action on Champlin for the possession of the premises; (6) that the relation of vendor and vendee created between Champlin and Tschannen by the contract was not changed by Tschannen's default into that of landlord and tenant; (7) that at the time Champlin brought this suit he had no such possessory rights to the property replevied as would enable him to maintain an action of trespass against Tschannen's vendee for her interference with such property, and therefore he could not maintain this action.

ERROR from the district court of Jefferson county. Tried below before BROADY, J.

The facts are set out in the opinion.

Charles B. Rice, for plaintiff in error :

A mortgagee, or vendor under contract for deed, prior to foreclosure of the equity of redemption, has no right of possession sufficient to maintain replevin for chattels severed from the realty by one rightfully in possession.

A dwelling house, severed from the realty by one rightfully in possession, and affixed to other realty by being placed on stone pillars, and occupied as a residence, is real

estate, and not subject to replevin. (Cobbey, Replevin, 12, 136, 354, 364; *Johnson v. Elwood*, 53 N. Y., 431; *Riley v. Boston Water Power Co.*, 11 Cush. [Mass.], 11; *Shields v. Lozeau*, 5 Vroom [N. J.], 496; *Anderson v. Hapler*, 34 Ill., 426; *Fryatt v. Sullivan Co.*, 5 Hill [N. Y.], 116; *Kircher v. Schalk*, 39 N. J. Law, 335; *Northrup v. Trask*, 39 Wis., 515.)

S. N. Lindley and A. H. Moulton, contra:

The property involved is a proper subject of replevin. (*Rogers v. Arnold*, 12 Wend. [N. Y.], 30; *Pangburn v. Patridge*, 7 Johns. [N. Y.], 140; *Commissioners of Rush County v. Stubbs*, 25 Kan., 322; *Western Union Telegraph Co. v. Burlington & S. W. R. Co.*, 11 Fed. Rep., 1; *Mills v. Redick*, 1 Neb., 437; *Roberts v. Randel*, 3 Sanf. [N. Y.], 707; *Waters v. Reuber*, 16 Neb., 99.)

RAGAN, C.

Lewis C. Champlin brought action in replevin in the district court of Jefferson county against Elizabeth Ellsworth. Pending the action Champlin died and the suit was revived in the name of Elmer E. McDowell, his administrator, who had a verdict and judgment, and Ellsworth brings the case here for review.

On the 4th day of April, 1887, Champlin owned certain real estate in the city of Fairbury, in said county, and on that date entered into a written contract with one J. H. Tschannen, in and by which he sold and agreed to convey said real estate to Tschannen when Tschannen should make the following payments: October 4, 1887, \$25; April 4, 1888, \$100; April 4, 1889, \$100; April 4, 1890, \$100; April 4, 1891, \$100. The contract contained this provision: "It is further agreed that in case any payments, either of principal or interest, remaining unpaid for the space of thirty days after the same shall become due, then, in that case, the whole amount unpaid on this contract shall be-

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come due and payable without further notice. And the said party of the second part [Tschannen] further agrees that any such delinquency in payment or the failure in other respects by the party of the second part to perform the stipulations of this contract, or any of them, shall entitle the party of the first part [Champlin] to the immediate possession of the premises described herein, and all equitable and legal interests in the premises, hereby contracted, with all the improvements and appurtenances, shall revert to and revest in said first party without any right of said second party of reclamation or compensation for moneys paid, as absolutely as if this contract had never been made." Tschannen at once took possession of this real estate and erected thereon a frame building, or dwelling house, in which he and his family resided. It seems also, though this is not entirely clear from the evidence, that the father and mother of Tschannen's wife resided with them in the house on said premises. In November, 1888, Mrs. Ellsworth, the plaintiff in error, purchased this house of Tschannen and caused it to be moved from the lot on which Tschannen erected it to another lot. At the time of this removal Mrs. Ellsworth and her husband and the Tschannen family resided in the house. Champlin then brought this action in replevin for the house and caused the sheriff to remove it from the lots on which Mrs. Ellsworth had placed it back to the lot on which it was built; the plaintiff in error and the Tschannen family, during the time of said removal and afterwards, residing in the house.

Several cases in replevin have been decided in this court in which a house was the subject-matter of the suit. Such are *Mills v. Redick*, 1 Neb., 437; *Riewe v. McCormick*, 11 Neb., 261; *McCormick v. Riewe*, 14 Neb., 509; *Waters v. Reuber*, 16 Neb., 99; *Oscamp v. Crites*, 37 Neb., 837; *McDaniel v. Lipp*, 41 Neb., 713. But an examination of these cases will show that in each case where the plaintiff was permitted to recover his possessory rights and rela-

tions to the property replevied were such that he could have maintained an action of trespass against the party made defendant to the replevin action. In the case at bar Champlin had no such possessory rights or claims to the property replevied as would have enabled him at the time of the bringing of this suit to maintain an action of trespass against Mrs. Ellsworth, or against her vendor, Tschannen, and, therefore, he cannot maintain this action. (*Stockwell v. Phelps*, 34 N. Y., 363; *Rich v. Baker*, 3 Denio [N. Y.], 79; *Johnson v. Elwood*, 53 N. Y., 431; *Oscamp v. Crites*, 37 Neb., 837; *Kircher v. Schalk*, 39 N. J. Law, 335.)

It is argued by counsel for the administrator that prior to the bringing of this action Champlin was in the actual possession of the real estate which he had sold to Tschannen and of the house thereon. If the evidence in the record sustained this assertion, then, of course, Champlin, being rightfully in possession of the real estate and the house thereon, could maintain an action of trespass against Mrs. Ellsworth for removing the house or maintain an action of replevin to recover it; but the evidence does not sustain this contention. The record shows that some time prior to the removal of this house by Mrs. Ellsworth, and while Tschannen was absent from home, Champlin hired a workman to go upon the premises and put some stones and bricks as a foundation under the house. The day this was done, it would seem from the evidence, Mrs. Tschannen and the other members of the family were also absent from the premises, but Tschannen's household goods were in the house and it was fastened. This is all the evidence in the record as to Champlin's actual possession of this house and the lot on which it was located. This was not possession. Champlin, in causing the workman to go upon these premises without the knowledge or consent of Tschannen, was guilty of trespass, and possession of property obtained by trespass cannot be made the basis of an action of replevin

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for the possession of such property. Champlin's possession, if it can be called such, was not only wrongful, but it continued no longer than the workman was engaged on the day mentioned in putting the stones and bricks under the house. The Tschannen family continued to reside in the house, as already stated, until it was removed by Mrs. Ellsworth and until after the officer, under the writ of replevin issued in this action, moved the house back to the lot on which it was erected.

Counsel for the administrator also argue that since the contract of sale between Champlin and Tschannen contained the provision that in case Tschannen should make default in the terms of his contract that such default should entitle Champlin to the immediate possession of the premises, and as Tschannen had made default in the payments promised to be made, that, therefore, the contract was at an end, all rights of Tschannen thereunder destroyed, and the real estate and the house thereon belonged both legally and equitably to Champlin, and that Tschannen occupied the property from the time of his default as tenant at will. In other words, that Champlin had constructive possession of the property through his tenant, Tschannen. This argument is not tenable. After Tschannen made default in his promises Champlin had either one of several remedies. He could tender Tschannen a deed for the premises and sue him at law for the entire contract price. He could have brought an action in equity to foreclose the contract as a mortgage and had the real estate sold for the payment of the amount remaining due thereon. (*Gardels v. Klope*, 36 Neb., 494.) He could have maintained an action in ejectment. Because Tschannen had made default in his contract Champlin was not thereby authorized to take possession of the premises with force and arms; nor was the relation of vendor and vendee created between the parties by the contract altered by Tschannen's violation thereof into that of landlord and tenant. The expression in the

contract, that Tschannen's default should entitle Champlin to the immediate possession of the premises, meant and means no more than that Champlin, by reason of the contract, might make the default of Tschannen the basis of an action for the recovery of the possession of such real estate.

On the trial the administrator introduced evidence tending to disparage or impeach the title of Mrs. Ellsworth to the house in controversy, and the counsel argue here that the evidence in the record would not sustain a finding that Mrs. Ellsworth purchased this house from Tschannen. Mrs. Ellsworth purchased this property, if at all, with actual knowledge of the existence and terms of the contract between Champlin and Tschannen. She, therefore, has no greater rights to this house than Tschannen had. But Champlin cannot maintain an action of replevin for this house as against Tschannen, because, as already seen, at the time the action was brought he, Champlin, was not entitled to the immediate possession of the house. "To allow replevin to be maintained under such circumstances as these makes the writ in effect a writ of restitution for land, an office which it cannot be permitted to fulfill." (IRVINE, C., in *Oscamp v. Crites*, *supra*.) The question at issue here is not whether Mrs. Ellsworth at the commencement of this action had good title to this house, as the plaintiff in a replevin action must recover, if at all, upon the strength of his own title to the property involved, and not upon the weakness of the defendant's title to such property. (*Kavanaugh v. Brodball*, 40 Neb., 875.) In *Northrup v. Trask*, 39 Wis., 515, it is said: "If one who is rightfully in possession of land under a contract of sale, after default in payment, but before any foreclosure of his equity, dispose of a house attached to such land, (as by removing it to other land,) the vendor in the land contract, having no possessory title to the house, cannot maintain replevin or trover therefor."

The finding of the district court in favor of the admin-

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istrator is wholly unsupported by the evidence. The administrator must return the house to the plaintiff in error or pay her its value. The judgment of the district court is reversed and the cause remanded.

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REVERSED AND REMANDED.

SCHOOL DISTRICT NUMBER FORTY-NINE, ADAMS
COUNTY, V. JAMES COOPER.

FILED APRIL 5, 1895. No. 4986.

1. **Transcripts for Review: PROCEEDINGS DEFINED.** Section 586 of the Code of Civil Procedure construed, and *held*, the word "proceedings" in this section includes duly certified copies of the pleadings on which an action was tried. If tried on pleadings filed originally in the district court, then the record brought here must contain certified copies of those pleadings. If tried in the district court without original pleadings and on proceedings certified upon appeal, then the record here must contain certified copies of such proceedings.
2. ———: **ORIGINAL RECORDS.** This requirement of the statute is jurisdictional and cannot be waived by the parties; and the filing in this court of the original pleadings used in the district court will not answer the requirements of the statute. *Moore v. Waterman*, 40 Neb., 498, followed.
3. ———: **STIPULATION TO USE ORIGINAL PAPERS UPON REVIEW.** Even though the parties should so stipulate, the original pleadings, files, or proceedings of the case cannot be examined in reviewing such case, either on appeal or error.
4. **Bill of Exceptions: AUTHORITY OF CLERK TO SIGN: STIPULATION.** The mere stipulation of counsel in a case that the clerk of the court may sign and allow a bill of exceptions is not sufficient to confer authority upon him to do so. To confer authority upon the clerk of a district court to sign and allow a bill of exceptions it must appear that the judge is dead, or that he is prevented by sickness, or absence from his district, from signing and allowing the bill; or, the parties or their counsel

44	714
48	163
44	714
49	589
50	228
50	445
52	446
54	506
55	668

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must agree upon the bill of exceptions and attach thereto their written stipulation to that effect. *Scott v. Spencer*, 42 Neb., 632, followed.

ERROR from the district court of Adams county. Tried below before GASLIN, J.

C. H. Tanner, for plaintiff in error.

Batty & Dungan, contra.

RAGAN, C.

James Cooper recovered a judgment in the district court of Adams county against school district No. 49 of said county, to reverse which the school district prosecutes to this court a petition in error.

It appears from the briefs of counsel that the school district had caused an acre of land belonging to Cooper to be taken and appraised for school purposes, and from the appraisal so made Cooper appealed, or attempted to appeal, to the district court, where the case was tried to a jury and the verdict rendered on which the judgment sought to be reversed was based. We find ourselves unable to review the errors, or any of the errors, assigned by counsel for the school district for the following reasons:

1. The record filed here, purporting to be a transcript of the record of the case from the district court, begins by citing that the case came on for hearing upon the special appearance of the school district objecting to the jurisdiction of the court; that this objection was overruled and Cooper was granted leave to file an appeal bond *nunc pro tunc*; that the case then came on for hearing on the motion of Cooper to suppress certain depositions, which motion the court sustained; the calling and swearing of a jury, the submission of the case to it, their verdict, and the judgment of the court thereon; and this is all that the record here contains. In other words, there are in the record

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none of the appraisement and condemnation proceedings out of which this action grew, nor any pleadings on which the action was tried. The case was probably not tried on pleadings filed originally in the district court, nor does it seem that in a case like this one such pleadings were at that time necessary; but in order for us to review this judgment the plaintiff in error must bring here a duly certified transcript of all the proceedings had in the district court. Section 586 of the Code of Civil Procedure provides: "The plaintiff in error shall file with his petition [in error] a transcript of the proceedings containing the final judgment or order sought to be reversed, vacated, or modified." The word "proceedings" in this section includes duly certified copies of the pleadings on which the action was tried. If tried on pleadings filed originally in the district court, then the record here should contain certified copies of those pleadings; if tried in the district court without original pleadings and on the proceedings certified upon appeal, then the record here should contain certified copies of such proceedings. In the case at bar, if this action was tried in the district court on the appraisal and condemnation proceedings had, then the record here, in order for us to review the judgment pronounced, should contain certified copies of such appraisal and condemnation proceedings. Accompanying the record in this case are what is generally denominated the original files of the action belonging to the district court of Adams county. The record shows that counsel for the parties to this suit stipulated that these original files might be used in this court on the hearing of this petition in error. Notwithstanding the stipulation of counsel the court is without authority to consider these filings, or any of them, on this hearing. The statute provides, as already seen, that the plaintiff in error shall file with his petition in error a transcript of the proceedings containing the final judgment sought to be reviewed. A transcript does not mean

the original papers, but copies of them duly certified. This requirement of the statute is jurisdictional and cannot be waived by the parties; and the filing in this court of the original pleadings used in the district court does not take the place of such transcript. (*Moore v. Waterman*, 40 Neb., 498.) Parties may use in this court the original bills of exceptions instead of a transcript thereof. (Sec. 587a, Code of Civil Procedure.) But the original pleadings, files, or proceedings of a case cannot be examined by this court in the hearing of such case, either on appeal or error.

2. We are unable to review this judgment for another reason. The record does not show that a motion for a new trial was made in the court below. It has been so many times decided by this court that in order for it to review the judgment of a district court, or the proceedings on the trial on error, that a motion for a new trial must be made and filed in and brought to the attention of that court, that it is unnecessary to cite the cases. Counsel for the parties to this action stipulated in writing as follows: "It is hereby stipulated and agreed by and between the parties hereto, by their respective attorneys, that J. H. Spicer, clerk of the district court of Adams county, shall sign and settle the within bill of exceptions and make the same a part of the record in this case, etc." In pursuance of this stipulation the clerk of the district court signed and settled the bill of exceptions. This stipulation is almost identical with the stipulation in *Scott v. Spencer*, 42 Neb., 632, and it was there held that the mere stipulation of counsel in a case that the clerk of the court may sign and allow a bill of exceptions is not sufficient to confer authority upon him to do so. That to confer authority upon the clerk of a district court to sign and allow a bill of exceptions it must appear that the judge is dead, or that he is prevented by sickness or absence from his district from signing and allowing the bill; or the parties to the litiga-

tion or their counsel must agree upon the bill of exceptions, and attach thereto their written stipulation to that effect. In the case at bar counsel do not stipulate that what purports to be the bill of exceptions is in fact such; they simply stipulate that the clerk may sign and allow the bill. If the record before us, then, contained a certified transcript of the pleadings or proceedings had in the district court we would still be unable to examine the evidence.

Almost the entire argument of counsel for the plaintiff in error is directed to the point that the district court had no jurisdiction of the subject-matter of the action in which it pronounced the judgment sought to be reviewed. From counsel's statement of the facts it would seem that this contention is correct; but this court can know nothing of a case except what it gathers from the record before it; and since we do not know from the record what the original controversy between the school district and Cooper was, what was done in that controversy prior to the time it reached the district court, nor what the district court had before it and on which it acted, we are unable to say whether or not counsel's contention is correct. We have here simply the judgment of the district court, a court of general jurisdiction, and every reasonable presumption must be indulged as to the correctness of that judgment. It follows, therefore, that the judgment of the district court must be and is

AFFIRMED.

JAMES F. MARTIN V. FILLMORE COUNTY.

FILED APRIL 5, 1895. No. 6195.

1. **Bill of Exceptions: AUTHENTICATION OF DOCUMENTS.** In order to authenticate a document attached to a record as the bill of exceptions settled in the district court there must be a certificate of the clerk of the court to that effect. *Moore v. Waterman*, 40 Neb., 498, followed.
2. ———: **AUTHORITY OF CLERK TO SIGN: STIPULATION.** The mere stipulation of counsel that the clerk of the court may sign and allow a bill of exceptions is not sufficient to confer authority upon him to do so. In order to confer such authority it must appear that the judge is dead; that he is prevented by sickness or absence from signing and allowing the bill; or the parties or their counsel must agree upon the bill of exceptions and attach thereto their written stipulation to that effect. *Scott v. Spencer*, 42 Neb., 632, followed.
3. **Eminent Domain: COUNTIES: DRAINAGE: DAMAGES.** Where land is appropriated for public use the owner thereof is entitled to recover the value of the land appropriated without any deduction for benefits. In addition thereto he should recover any damages sustained by that portion of the land not appropriated and, as against the latter item, special benefits but not general benefits may be set off. (*Wagner v. Gage County*, 3 Neb., 237.)
4. ———: ———: ———: ———. The foregoing is a rule interpreting that clause of the constitution providing that the property of no person shall be taken or damaged for public use without just compensation therefor, and it is beyond the power of the legislature to change the rule.
5. ———: ———: ———: ———. To constitute an appropriation of land it is not necessary that the owner be deprived of the fee. Land is appropriated when it is so taken as to deprive the owner of the use thereof. It is only when the owner is not deprived of the occupancy of the land, but merely suffers an incidental damage thereto because of the proximity of the improvement, that benefits may be set off against such damage.
6. ———: ———: ———: ———: **PLEADING.** Therefore, where the petition alleged that a county ditch had been constructed through and across the plaintiff's land and the answer admitted that fact, no payment being pleaded, a verdict allowing the plaintiff no damages is contrary to law.

44	719
47	89
47	164
47	200
47	396
47	847
48	168

44	719
53	569
54	506

Martin v. Fillmore County.

ERROR from the district court of Fillmore county. Tried below before HASTINGS, J.

J. D. Hamilton and John D. Carson, for plaintiff in error.

Charles H. Sloan, contra.

IRVINE, C.

The plaintiff in error was plaintiff in the district court and alleged in his petition, in brief, that he was the owner of certain land in Fillmore county; that a petition in due form had been filed with the board of supervisors praying that a county ditch be constructed, in its course crossing the plaintiff's land; that no sufficient notice was given of the filing and pendency of such petition, but without such notice the prayer of the petitioners was granted; that the plaintiff had no notice of such proceedings; that the ditch was constructed across his land; that he filed a claim of damages before the board of supervisors, which was allowed to the extent of \$50; that this proceeding was an appeal from the order making such allowance; that his land was damaged to the amount of \$1,000, for which sum he prayed judgment. The petition had attached thereto as exhibits certified copies of the proceedings of the supervisors concerning said ditch. The county answered denying all allegations not specifically admitted, then alleging affirmatively that the ditch ran through the plaintiff's land, and while it caused some damage the benefits therefrom to said land exceeded the damage, and that the plaintiff was therefore entitled to recover nothing. The answer further alleged that due notice had been given, and that the plaintiff neglected to file his claim within the time provided by law. There was a trial to a jury and a verdict for the defendant, on which judgment was entered, and the plaintiff prosecutes error.

It is urged that the verdict is not sustained by sufficient evidence, and one other assignment relates to a matter occurring on the trial. There is attached to the transcript what purports to be a bill of exceptions, but there nowhere appears any certificate of the clerk authenticating this document as the original, or as a copy of the bill. Such a certificate is necessary for the authentication of the record. (Code Civil Procedure, sec. 587b; *Moore v. Waterman*, 40 Neb., 498.) Furthermore, what purports to be a bill of exceptions purports also to be settled by the clerk of the court under a stipulation precisely similar to that set out in the opinion in *Scott v. Spencer*, 42 Neb., 632. It was in that case held that the mere stipulation of counsel that the clerk of the court may sign and allow a bill of exceptions is not sufficient to confer authority on him to do so. To confer such authority it must appear either that the judge is dead; that he is prevented either by sickness or absence from his district from signing and allowing the bill; or the parties or their counsel must agree upon the bill and attach thereto their written stipulation to that effect. A stipulation that the clerk may settle the bill without a stipulation that the bill submitted is agreed to is insufficient to confer authority upon the clerk in the premises. We cannot, therefore, examine either of the assignments of error referred to.

Error is assigned upon the giving of instructions 8, 9, 10, 11, and 12. The language of the assignment is the same as in *Hiatt v. Kinkaid*, 40 Neb., 178. The twelfth instruction states the familiar rule that in such cases general benefits may not be set off against damages sustained. This instruction was undoubtedly correct. (*Schaller v. City of Omaha*, 23 Neb., 325.) This instruction being correct the whole assignment must be overruled.

Another assignment is to the giving of instruction No. 2 asked by the defendant. The record contains an instruction numbered 2, but it does not appear whether it was

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given by the court of its own motion or at the request of one of the parties. The record also shows that the instruction was modified and only a portion thereof given, and we cannot ascertain how much was given. Error, therefore, does not appear in this respect.

While we are thus precluded from examining many of the questions presented, we still think that the judgment must be reversed. One assignment is that the verdict is contrary to law. The petition alleges and the answer expressly admits that the ditch was constructed through and across the plaintiff's land. The verdict was absolute for the defendant. Under no possible state of the evidence could this verdict be right. The court instructed the jury, and we must presume correctly, that no proceedings had been taken which would preclude the plaintiff from maintaining his action. Payment of compensation was not pleaded. The plaintiff was, therefore, entitled as one item of damages to recover the value of the land actually appropriated for the construction of the ditch. Against this item of damages no benefits could be set off. In addition thereto he was entitled to recover any damages sustained by the land not appropriated, and as against the latter item special benefits, but not general benefits, might be set off, provided that the use for which the appropriation was made was a public use and within the power of eminent domain,—a question not here raised and not decided. (*Wagner v. Gage County*, 3 Neb., 237; *Fremont, E. & M. V. R. Co. v. Whalen*, 11 Neb., 585; *Chicago, K. & N. R. Co. v. Wiebe*, 25 Neb., 542; *City of Omaha v. Howell Lumber Co.*, 30 Neb., 633.) The foregoing is a rule interpreting that clause of the constitution providing that the property of no person shall be taken or damaged for public use without just compensation therefor. Whether the act providing for the construction of such ditches (Comp. Stats., ch. 89) contemplates an assessment of damages in accordance with this rule is immaterial to the case. It is beyond the power

Martin v. Fillmore County.

of the legislature to change it. The district court seems to have proceeded upon the theory that no land was actually appropriated, but this is contrary to the pleadings. To constitute an appropriation of land it is not necessary that the owner be divested of the fee. Land is appropriated when its *corpus* is seized and devoted to the improvement so as to deprive the owner of the use of the land. The nature of the estate in the land which is appropriated may possibly affect the amount of recovery, but does not affect the right to recover. It is only when the owner is not deprived of the occupancy of the land, but merely suffers an incidental damage thereto owing to the proximity of the improvement, that benefits may be set off against such damage. Wherever the owner by the seizure of his land is deprived of the occupancy thereof he is entitled to recover absolutely the value of the land so taken or of such estate therein as is appropriated. The ditch could not have been constructed across plaintiff's land without an appropriation of some part thereof and under the pleadings, therefore, the plaintiff was entitled to a verdict in some amount.

Counsel attempt, in their briefs, to draw a distinction between the measure of damages in the case of condemnation proceedings and in a case where the county has entered without instituting any such proceedings. As the case must be remanded for a new trial it may be well to say that we do not conceive this distinction to be well founded. The rule of damages, as above stated, applies to every case of the appropriation or damage of property for public use without regard to the nature of the proceedings in which recovery is sought.

REVERSED AND REMANDED.

DANIEL MONDAY V. WILLIAM O'NEIL.

FILED APRIL 5, 1895. No. 6167.

Landlord and Tenant: RIGHT OF TENANT TO CROP GROWN DURING FORECLOSURE OF MORTGAGE. A tenant for years of mortgaged land planted a crop after the rendition of a decree foreclosing the mortgage, the tenant having been a defendant in the foreclosure suit. The land was sold under the decree and the sale confirmed while the crop was growing and before it matured. The purchaser did not obtain possession of the land, but permitted the tenant to retain possession, merely notifying him that he, the purchaser, would expect from the tenant rent in money or in kind. *Held*, That as between the tenant and purchaser the former was entitled to the crop.

ERROR from the district court of Dodge county. Tried below before SULLIVAN, J.

Frick & Dolezal, for plaintiff in error, cited: *Jones v. Thomas*, 8 Black. [Ind.], 428; *Smith v. Hague*, 25 Kan., 246; *Beckman v. Sikes*, 35 Kan., 120; *Scriven v. Moote*, 36 Mich., 64; *Lane v. King*, 8 Wend. [N. Y.], 584; *Shepard v. Philbrick*, 2 Den. [N. Y.], 174; *Simers v. Saltus*, 3 Den. [N. Y.], 219; *Gillett v. Baloom*, 6 Barb. [N. Y.], 370; *Jewett v. Keenholts*, 16 Barb. [N. Y.], 193; *Gardner v. Finley*, 19 Barb. [N. Y.], 320; *Howell v. Schenck*, 24 N. J. Law, 89; *Pitts v. Hendrix*, 6 Ga., 452; *Sherman v. Willett*, 42 N. Y., 146; *Borrell v. Dewart*, 37 Pa. St., 134; *Tripp v. Seeig*, 20 Mich., 254; *Lathrop v. Nelson*, 4 Dill. [U. S.], ; *Taylor v. Cooper*, 10 Leigh [Va.], 317; *Wagner v. en*, 6 Gill. [Md.], 102; *Taylor v. Courtney*, 15 Neb., ; *Day v. Thompson*, 11 Neb., 128.

Hollenbeck, contra, cited: *Sornberger v. Berggren*, 20 , 399; *Whitmarsh v. Cutting*, 10 Johns. [N. Y.], 361; *silly v. Rhodes*, 12 O., 88; *Houtz v. Showalter*, 10 O. 124.

IRVINE, C.

This case was tried in the district court on a stipulation of facts. The court instructed the jury to return a verdict for the defendant, and from the judgment rendered thereon the plaintiff prosecutes error.

The action was one in the nature of trover for eighty acres of corn grown and a part thereof standing on the west one-half of the northwest quarter of section 13, township 18, range 5, in Dodge county. The essential facts, as disclosed by the stipulation, are as follows: On the 14th day of January, 1889, one Stanford, who was then the owner of the land described in the petition, executed a mortgage thereon to the J. T. Robinson Notion Company. On the 3d of January, 1891, an action was brought to foreclose this mortgage, the parties defendant being Stanford and wife and O'Neil, the defendant in this case, the petition alleging that O'Neil claimed a leasehold interest in the premises, but that such interest was inferior to the interest of the plaintiff. All the defendants made default, and on April 23, 1891, a decree of foreclosure was rendered. On June 26, 1891, the land was sold under the decree of foreclosure to the plaintiff. On the 27th of June the sale was confirmed and a deed executed, which was the same day recorded. O'Neil was the tenant of Stanford for one year from March 1, 1891, and the corn in question was planted by O'Neil in May, 1891, and was growing at the time of the sale and confirmation. No lease was made by the plaintiff to O'Neil, but O'Neil continued in possession after the sale, and Monday made no effort to obtain possession except that at different times during the summer of 1891 he notified O'Neil not to pay rent to Stanford and that he would insist on either the rent or a portion of the crops.

The question presented is, therefore, whether under the foregoing state of facts Monday or O'Neil was the owner of

the crops growing on the land, but not matured at the time the sale was confirmed. Since the briefs were filed the cases of *Yeazel v. White*, 40 Neb., 432, and *Foss v. Marr*, 40 Neb., 559, have been decided. Their effect is to limit the inquiry here to a much narrower field than that covered by the briefs. In *Yeazel v. White* it was decided that the owner of land sold upon execution retains the right of possession and is entitled to the usufruct of such land until confirmation of the sale, and that therefore the judgment debtor is not accountable to the purchaser for hay cut upon the land after sale and before confirmation. In *Foss v. Marr* it was held that a mature crop of corn standing upon land sold at judicial sale and not taken into account by the appraisers did not pass to the purchaser but remained the property of the mortgagor who had planted and cultivated it. In the latter case some stress was laid upon the fact that the crop was matured, and the language of the supreme court of Iowa in *Hecht v. Dettman*, 56 Ia., 679, wherein a distinction is drawn between a growing crop and one already matured but not severed, was quoted as confirming the conclusion reached. The language used in *Hecht v. Dettman* was, however, employed to distinguish that case from *Downard v. Groff*, 40 Ia., 597, holding that the right to growing crops passes to the purchaser at a judicial sale. *Downard v. Groff* followed the general current of authority and recognized that *Cassilly v. Rhodes*, 12 O., 88, was opposed to the conclusion reached, stating truly that *Cassilly v. Rhodes* was based upon a construction of the Ohio appraisement law. *Foss v. Marr*, was based upon the doctrine of *Cassilly v. Rhodes*, our appraisement law being similar to that of Ohio, and the reasons given by the Ohio court for departing from the general rule because of the effect of the appraisement law being deemed sound and applicable to this state. The court did not, in *Foss v. Marr*, undertake to decide that growing crops do pass to the purchaser; on the contrary, in the last para-

graph of the opinion it is expressly stated that that question was neither presented nor decided. *Cassilly v. Rhodes*, was a case where the crop involved was one which had not matured, and the language of the opinion refers to it throughout as a growing crop. The reason of the decision was that the value of the annual crops is not included in the appraisement made prior to the sale, and that the debtor's rights therein can be saved only by regarding such crops as personalty requiring a separate levy. This reasoning, which is approved in *Foss v. Marr*, is equally applicable to a growing crop as to one matured. In *Houts v. Showalter*, 10 O. St., 125, *Cassilly v. Rhodes* was reaffirmed, and the crop there in controversy was also a growing crop. It will be remembered that Monday, after he obtained title to the land, did not enter into possession thereof, but suffered O'Neil to remain in possession, merely notifying him that Monday would expect either rent or a portion of the crop; that is, he treated O'Neil as his tenant, demanding rent either in money or in kind. O'Neil's conduct is not sufficiently disclosed to establish whether or not there was an attornment by him to Monday. Assuming that there was not, it would seem that he was holding adversely; and if so, it is not apparent how Monday could obtain the crop. If he were not holding adversely, then his relationship to Monday would seem to be that of a tenant at will. At the common law, when a tenancy is uncertain so that the tenant cannot know that his estate will terminate before the crop can ripen, the tenant is entitled to re-enter and harvest the crop at maturity. This is the law in this state. (*Sornberger v. Berggren*, 20 Neb., 399; *McKean v. Smoyer*, 37 Neb., 694.) Under this principle it would seem clear that O'Neil was entitled to the crop.

In opposition to this view it is argued that the foreclosure suit had been begun, and, indeed, a decree of foreclosure rendered before the crop was planted, but we do not

Monday v. O'Neil.

think this fact material. O'Neil knew, of course, that a sale might be made and confirmed before his crop would mature, but he could not know that such would be the case. We do not think that he was obliged to abandon the land or permit it to lie uncultivated merely because there was a possibility or a probability that his estate would be determined before the crop would mature. Public policy requires that the law should be so construed as to encourage rather than discourage the tillage of lands under such circumstances. The language of the supreme court of Ohio in *Houts v. Showalter*, *supra*, is peculiarly applicable: "Under our system, frequent advertisements and offers for sale, and, occasionally, revaluations are necessary, before a sale can be effected. When an appraisement is made, it cannot be foreseen when a sale will be effected. It is not for the interest of any party, nor for the public interest, that the land should thenceforth lie waste; then there may have been no crop sown or planted; but when the sale comes to be made, there may be growing crops put into the ground in the meantime." This language was used with reference to the period between appraisement and sale, but it applies with all the more force to the period between decree and sale. We are not determining in this case what the rights of the parties would be had Monday secured possession and evicted O'Neil before the crop matured. What we hold is that following the reasoning in *Cassilly v. Rhodes* and *Foss v. Marr*, the tenant should be protected in his crop unless before it is matured something happens to deprive him of the right thereto, and that, therefore, where the purchaser permits the tenant to remain in possession until the crop is harvested, the title thereto remains in the tenant and does not pass to the purchaser. We have referred to O'Neil as the tenant, but what has been said is applicable to the mortgagor himself. We have treated O'Neil as if he were himself the mortgagor because, without inquiry as to

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whether he would otherwise have any higher rights, having been made a defendant in the foreclosure suit, a decree having there been rendered barring his estate, it is clear that in this proceeding he stands in no better position than had he been the mortgagor instead of the mortgagor's tenant. Under the view of the law above presented the plaintiff was not, under the stipulation, entitled to recover and the peremptory instruction given by the trial court was correct.

JUDGMENT AFFIRMED.

44	729
45	695

EUGENE YOUNKIN, ADMINISTRATOR, APPELLEE, V.
HOWARD YOUNKIN, APPELLANT.

FILED APRIL 5, 1895. No. 5600.

1. **Res Adjudicata: ACCOUNTING.** Where a decree has been rendered determining certain issues in a case and reserving the case for further proceedings to carry out the first decree, as for an accounting, the supplemental proceedings cannot be made the means of relitigating any issues determined by the first decree.
2. **Accounting: REVIEW.** Evidence examined, and *held* sufficient to sustain the finding of the trial court.

APPEAL from the district court of Saline county. Heard below before HASTINGS, J.

F. I. Foss, for appellant.

Halleck F. Rose and *M. H. Fleming*, contra.

IRVINE, C.

This action was originally commenced by Eva M. Gilaspie against Howard Younkin, her son, alleging that dur-

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ing her son's minority she had purchased a farm in Saline county and procured the title to be taken in the name of the defendant for the sole purpose of preventing her second husband, Gillaspie, from whom she was then separated, from asserting any interest therein; that she had made improvements upon the farm and placed certain personal property thereon; that she removed with her family, including the defendant, to said farm; that the defendant refused to convey the farm to her or to account to her for the personal property thereon; that she had been compelled to remove therefrom, leaving him in possession. She offered to pay the reasonable value of his services upon the farm since his majority, and prayed for a conveyance and an accounting. To this petition an answer was filed placing the material allegations in issue. There was a trial before Morris, J., resulting in a decree finding substantially for the plaintiff, decreeing a conveyance to her, and referring the case for an accounting between the parties. There has been no appeal from this decree, but subsequently thereto the plaintiff executed a lease of the farm to the defendant under an agreement that if on the accounting anything should be found due from the plaintiff to the defendant, then the rent should be applied in payment thereof. The order of reference was afterwards set aside and an accounting had before Hastings, J., who found due the defendant on account of services and for advancements made by him \$1,261.60; that there was left in the hands of the defendant property of the plaintiff to the value of \$969.50; that there was due for rent \$320, leaving a balance in favor of the plaintiff of \$27.90, for which judgment was entered. Pending these supplemental proceedings the plaintiff had died and the action was revived in the name of the administrator, who appeals from this decree.

It is claimed by the appellant that the court restricted the accounting to too narrow a field and should have admitted certain evidence which was rejected. One question

asked the appellant was as follows: "Please tell the court the items which you have paid out for and on behalf of the place, either personal property or the real estate, and then credits that you give from sales which have come from the same." An objection to this question was sustained. A sufficient reason for doing so is found in the fact that it called for a statement of moneys paid for the land itself. This issue had already been determined adversely to appellant by the interlocutory decree, and was not open in the accounting to reinvestigation. Again, certain questions were objected to, seeking to elicit proof that two out of four horses placed on the farm when it was first bought belonged to appellant, he having acquired them from his father's estate. The petition distinctly alleged that these four horses belonged to the plaintiff. The answer, among other things, alleged a subsequent agreement whereby, together with other promises, the plaintiff was to give defendant the stock upon the farm. The decree found against the defendant on this issue. The decree also finds "that the farm had upon it stock and farming machinery, the character and value of which I do not find." There is no distinct finding that these horses were the property of plaintiff, but if that question were put in issue at all, which is doubtful under the allegations we have referred to, we think that the first decree, reserving the case, as it does, solely for an accounting as to the appellant's services and impliedly of the value of the stock and farming machinery, determined the issue in favor of plaintiff. Where a decree has been rendered determining certain issues in a case, and reserving the case for further proceedings to carry out the first decree, as for an accounting, the supplemental proceedings cannot be made the means of relitigating any issues determined by the first decree. (*Santa Maria*, 10 Wheat. [U. S.], 442; *Sibbald v. United States*, 12 Pet. [U. S.], 491.) All the other questions argued are purely questions of fact. The evidence is conflicting and might sustain a finding either more or less

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favorable to the appellant than that contained in the decree. That finding, therefore, cannot be disturbed.

JUDGMENT AFFIRMED.

WESTERN UNION TELEGRAPH COMPANY V. BRIDGET
MULLINS.

FILED APRIL 5, 1895. No. 6246.

1. **Pleading.** Where a petition states a case entitling the plaintiff to judgment for any amount, it is good against demurrer, or an objection to the introduction of evidence on the ground that it does not state a cause of action.
2. **Master and Servant.** A master is not liable for the acts of his servant committed outside the line of his duty and not connected with the master's business.
3. **Telegraph Companies: ERRONEOUS DIRECTIONS OF AGENT: DAMAGES.** At the instance of the plaintiff one P. sent a telegraphic message to the chief of police at Seattle, Washington, inquiring whether plaintiff's husband was there employed by a certain company. P. left orders to deliver the answer to the plaintiff. The telegraph company delivered to the plaintiff a message dated Aspen, Colorado, and saying: "H. is here. Come at once. Will meet you at Glenwood Springs. Answer here if coming." In fact this message was not an answer to the plaintiff's and had no relation thereto. The plaintiff went to the telegraph office and asked the clerk to write a message in reply. The clerk asked where it should be sent. Plaintiff replied to Seattle. The clerk said, "This is from Glenwood Springs." Plaintiff inquired, "Is not this the answer to the dispatch which P. sent to Seattle?" The clerk said, "Certainly it is the answer. They have got him at Glenwood Springs and want you to meet him there." Plaintiff then asked if Glenwood Springs was on the route to Seattle and if it was far from Seattle. The clerk said it was on the route and he did not think it was very far from Seattle. Plaintiff then went to Seattle, but did not find her husband. The expense of the trip to Seattle and the loss of time caused thereby were the damages allowed by the jury.

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Held, (1) that the clerk's statement that Glenwood Springs was on the route to Seattle and not far therefrom was not within the line of his duty or the apparent scope of his employment, and the company was not liable for the consequences of that statement; (2) that plaintiff's going to Seattle was not a consequence reasonably to be considered as arising according to the usual course of things from the delivery to plaintiff by the telegraph company of the wrong message and that, therefore such damages could not be recovered.

ERROR from the district court of Lancaster county.
Tried below before TIBBETS, J.

Harwood, Ames & Pettis, for plaintiff in error, cited: *Western Union Telegraph Co. v. Foster*, 64 Tex., 220; *Cincinnati, H. & I. R. Co. v. Carper*, 112 Ind., 26.

Davis & Hibner, contra.

IRVINE, C.

The defendant in error, as plaintiff in the district court, recovered judgment against the plaintiff in error for \$167.20 damages which she claimed to have sustained because of the telegraph company's delivering to her, as an answer to a message by her sent, one which was not in fact an answer thereto. The petition alleges, in brief, that on or about the first day of October, 1891, the plaintiff employed one Pound to employ the telegraph company to transmit a message to Seattle, Washington, inquiring as to the whereabouts of plaintiff's husband, and the plaintiff paid in advance the charges for transmitting said message; that Pound instructed the telegraph company to deliver to plaintiff the answer; that the defendant negligently and carelessly delivered to plaintiff a telegram, claiming that the same was in answer to the message sent by her when in fact it was not in answer thereto, and had no relation thereto; that the plaintiff paid the telegraph company the charges on the second message; that by reason of the

premises the plaintiff was subjected to expense, loss of time, and annoyance, to her damage, etc. A general demurrer was filed to this petition and overruled, whereupon the defendant answered, and on the trial again raised the question of the sufficiency of the petition by objecting to the introduction of any evidence for the reason that the petition did not state a cause of action. This objection was overruled, and the overruling thereof is assigned as error. On this point the district court ruled correctly. The telegraph company contends that the petition was defective in that it did not aver what the messages were and how the damage arose. The petition does aver, however, that a message was delivered to the plaintiff purporting to be an answer to her message; that in fact it was not an answer thereto, and that plaintiff paid the charges on the latter message. The plaintiff, therefore, stated a cause of action at least for the recovery of the amount so by her paid. Indeed, the answer admits these facts and admits liability for the charges on the second message, in language more courteous than technical, as follows: "The amount of which payment, if plaintiff will kindly designate it in her petition, will be cheerfully refunded by said defendant, who hereby tenders the same in court and confesses judgment for the same." The averments referred to were, therefore, sufficient to protect the petition against a general demurrer or an objection on the trial to the introduction of evidence on the ground that no cause of action was stated.

At the close of the plaintiff's testimony the defendant asked the court to instruct the jury to return a verdict for the defendant. This motion was bad for the same reason as the objection to the evidence. A cause of action for some amount was pleaded and confessed.

Complaint is made in the briefs of the giving of two instructions. The only assignment of error relating thereto is directed *en masse* against instructions from 1 to 8 inclusive. Most of these are manifestly correct, the third

being merely a quotation of the statute in regard to the liability of telegraph companies for mistakes in transmitting messages. The assignment of error referred to is therefore bad. There are several assignments of error not referred to in the briefs and these must therefore be deemed waived.

The only assignments remaining for notice are that the verdict was not sustained by sufficient evidence and that the damages allowed were excessive. The evidence is brief and discloses no conflict. In 1891 the plaintiff's husband ceased writing to her and she employed A. L. Pound, a detective, to make search for him. Pound sent by the defendant company a message to the chief of police at Seattle, Washington, inquiring if Daniel P. Mullins was employed by the Seattle Dry Lumber Company. Pound directed the clerk of the telegraph company to deliver any answer which might be received to the plaintiff. The next day a message was delivered to the plaintiff as follows (omitting printed heading and check marks):

"Dated ASPEN, COLO., — 21.

"*To A. L. Pound:* H. is here. Come at once. Will meet you at Glenwood Springs. Answer here if coming.

"P. H. FITZPATRICK."

The following day the plaintiff went to the telegraph office and requested a person she calls the "operator" to write a message she wished to send in answer to the one received. What then occurred she relates as follows: "The operator asked me the question, 'Where do you wish to send it?' I said, 'To Seattle.' He replied, 'This is from Glenwood Springs.' I replied, 'How is that? Is not this the answer to the dispatch which Mr. A. L. Pound sent to Seattle?' He said, 'Certainly it is the answer.' I said, 'I don't understand it.' He said, 'Why, they have got him at Glenwood Springs, and want you to meet him there.' I then asked him if that was on the route to Seattle, and he said, 'Yes.' I asked him how far Glenwood

Springs was from Seattle, and he said he did not know exactly, but that it was not very far." The plaintiff then started for Seattle, but before arriving there learned that Glenwood Springs was not on the route. She went on to Seattle and remained there some time. The damages and only damages which were proved consisted of her traveling expenses to and from Seattle, her hotel bill, and thirty-five days' lost time, the value of which she places at \$1 per day. The foregoing is all the material evidence. Nearly all the remainder arose from a quibble as to her stating that her conversation was with the operator. The evidence leaves it quite clear that her conversation was really with the counter clerk, and that the use of the word "operator" by her was the result merely of carelessness or ignorance. Does this evidence sustain the verdict rendered? There can be no doubt that had the plaintiff gone to Glenwood Springs on a fruitless errand the company would have been liable for the expenses thus incurred. The telegram delivered to her was of such a nature as on its face to apprise the company that the natural and probable consequences of its delivery would be such a journey on her part. But it is equally clear that a trip to Seattle on the delivery to the plaintiff of a message from Aspen, Colorado, directing her to go to Glenwood Springs would not be a consequence which might fairly and reasonably be considered as arising according to the usual course of things from the wrong of the telegraph company, nor could it reasonably be supposed to have been in the contemplation of the parties as the probable result of the telegraph company's act. In order to connect the trip to Seattle as a result of the delivery of the Aspen message it is necessary to treat the statements to the plaintiff by the counter clerk as binding upon the company. It is familiar law that a master is not liable for the acts of his servant unless those acts have been done in the line of the servant's duty and in furtherance of the master's business, or, as sometimes

expressed, the acts must be within the servant's apparent scope of employment. We have no doubt that the clerk's assurance to the plaintiff that the message delivered to her was an answer to that sent on her behalf might be said to have been within the scope of the clerk's employment; but this statement could not have induced her to go to Seattle. Such action, if induced by the transaction at all, must have been due to the clerk's statement that Glenwood Springs was on the route to Seattle and not very far therefrom. Had this statement been made by the clerk in regard to the sending of the message, and had it induced her to send a message which thereby went astray, or otherwise caused damage, the clerk's act might probably be charged to the company. Had she, instead of inquiring at the telegraph office, gone to a railway ticket agent and bought a ticket to Seattle on the faith of the statement that Glenwood Springs was on the route and not far therefrom, the railroad company might be liable, because the giving of directions of such a character would be connected with the sale of railroad tickets; but it could not be any part of the telegraph clerk's business to give instructions in geography to a person contemplating a trip by rail, and we cannot see how the telegraph company can be charged with the consequence of misinformation thus given.

The general principle governing the case is well settled; the application of the principle is not always easy. In *South & North Alabama R. Co. v. Huffman*, 76 Ala., 492, it was held that a railroad company was liable for erroneous advice and directions given by a ticket agent in regard to the train which the plaintiff should take. The doctrine of that case seems sound and would govern the case we have supposed of a misdirection by the telegraph clerk resulting in mis-sending a message, or of a ticket agent in sending a passenger astray. The Alabama case cites a large number of cases, only three of which, however, are at all in point. Two of these are cases where it was held that a railroad was liable for

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injuries sustained by a passenger in alighting from a moving train by the direction of the conductor. (*Lambeth v. North Carolina R. Co.*, 66 N. Car., 494; *Georgia Railroad & Banking Co. v. McCurdy*, 45 Ga., 288.) The third is the case of *Burnham v. Grand Trunk R. Co.*, 63 Me., 298, where a railroad company was held liable for ejecting a passenger from a train because his ticket was good only for the day issued where the passenger had stopped over on his route, relying on a statement of the ticket agent that the ticket permitted him to do so. This case also illustrates the hypothetical cases we have proposed. In all the cases we have cited the act was one clearly within the servant's line of employment and had direct reference thereto. On the other hand, in *Western Union Telegraph Co. v. Foster*, 64 Tex., 220, it was held not to be within the line of employment of a telegraph company's receiving clerk to correct at the request of the sender a mistake the latter made in writing a message, and that the company was, therefore, not liable for the consequences of sending the message as written without the correction. This is a much stronger case than that we are considering, and we would hesitate, perhaps, to follow it entirely; but it well illustrates the general principle that when an agent performs acts entirely outside the line of his employment the principal is not liable therefor. We think that the information given by the clerk that Glenwood Springs was not far from Seattle and on the way thereto, was wholly foreign to the master's business, and as this is the only evidence connecting plaintiff's trip to Seattle as a consequence of the misdelivery to her of the Aspen message, it follows that there was not sufficient evidence to establish the damages on which the verdict must have been grounded.

REVERSED AND REMANDED.

RAGAN, C., dissenting.

WALLACE WILBER ET AL. V. WILLIAM G. WOOLLEY.

FILED APRIL 16, 1895. No. 6415.

1. **School Buildings: RELOCATION.** A school-house cannot be changed at a special election of the voters of a district, but can be relocated at any annual meeting by a vote of two-thirds of those present, except where the original location is three-fourths of a mile from the geographical center of the district, in which case the site may, by a majority vote, be changed to a point nearer such center.
2. **Injunction: PUNISHMENT FOR DISOBEDIENCE.** A party is not punishable for contempt of court for disregarding a void order of injunction; but when an injunction is legally granted in a case where the court has jurisdiction of the subject-matter and of the parties, it must be respected until set aside by the court allowing it, or it is reversed in the appellate court by some appropriate mode of direct review.
3. ———: ———. Where one knowingly disobeys an injunction which is not void, he is liable to punishment for contempt, though he would have been entitled to a vacation of the order upon a motion to dissolve, or upon a trial upon the merits of the bill.
4. **Contempt: INJUNCTION BY COUNTY JUDGE.** The disobedience of an injunction allowed by a county judge in an action brought in the district court is a contempt against such court. *Johnson v. Bouton*, 35 Neb., 898, followed.

ERROR from the district court of Antelope county. Tried below before ALLEN, J.

Robertson, Wigton & Whitham, for plaintiffs in error:

An attempt to prevent an election by injunction amounts to nothing. Parties are not guilty of contempt for refusing to obey such an injunction. (2 High, Injunctions [2d ed.], 1286; *Guebelle v. Epley*, 28 Pac. Rep. [Col.], 89; *Smith v. McCarthy*, 56 Pa. St., 361; *Walton v. Develing*, 61 Ill., 201; *Darst v. State*, 62 Ill., 306; *Dickey v. Reed*, 78 Ill., 262; *Harris v. Schryock*, 82 Ill., 119.)

Where a court acts without jurisdiction of the subject-matter, as in attempting to prevent a person from doing a lawful act, its action is absolutely void, and one is not guilty of contempt in ignoring an injunction granted under such circumstances. (3 Am. & Eng. Ency. Law, 788; *State v. Milligan*, 28 Pac. Rep. [Wash.], 369; *Ex parte Fisk*, 113 U. S., 713; *In re Ayers*, 123 U. S., 443; *In re Sawyer*, 124 U. S., 200; *Smith v. People*, 29 Pac. Rep. [Col.], 924.)

O. A. Williams, contra.

NORVAL, C. J.

This is a petition in error to review an order made by the district court by which the plaintiffs in error were adjudged to be in contempt of court for violating an order of injunction. It appears from the record that at a special election held in school district No. 19, of Antelope county, on the 28th day of March, 1892, for the purpose of changing the location of the school-house site, a majority of the qualified voters present voted in favor of such removal. On May 31 William G. Woolley, a resident elector and taxpayer of the district, instituted an action in the district court of the county against the plaintiffs in error, all of whom being officers of said school district, to restrain the removal of the school-house to the new site selected at said special meeting. An order of injunction was duly allowed by the county judge of the county, bond was given by the plaintiff as required by statute, and the injunction order was personally served upon the plaintiffs in error on June 1. No steps were ever taken to vacate said injunction, and on the 28th and 29th days of June, 1892, the plaintiffs in error disobeyed the said order of injunction granted by the county judge, by removing the school-house from the northwest corner of section 8, the point where it had been located for six years, to the southeast corner of sec-

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tion 5. Subsequently an affidavit was filed in the cause by Woolley, setting up the breach of the injunction by the plaintiffs in error, upon which an order to show cause was issued by the district court, and an answer thereto was filed. Upon the hearing, the court found the plaintiffs in error guilty of a contempt of court, and imposed a fine of \$1 on each, and ordered a return of the school-house to the place from which it had been taken. The plaintiffs in error, in their answer to the order to show cause why they should not be punished for contempt, set up as justification for disobeying the injunction that at a general election held in said school district on June 27, 1892, the question of changing the school-house site was submitted to the qualified voters present, and, by a majority vote of said electors, such site was changed from the northwest corner of section 8, in township 27, range 5 west, to the southeast corner of section 5, in said township, and that in pursuance of said vote the plaintiffs in error, as the officers of said school district, caused the school-house to be moved to the point last above mentioned.

Section 8, subdivision 2, chapter 79, Compiled Statutes, provides: "The qualified voters in the school district, when lawfully assembled, shall have power to adjourn from time to time, as may be necessary, to designate a site for a school-house, by a vote of two-thirds of those present, and to change the same by a similar vote at any annual meeting; *Provided*, That in any school district where the school-house is located three-fourths of one mile or more from the center of such district, such school-house site may be changed to a point nearer the geographical center of the district by a majority vote of those present at any such school meeting." It will be observed that under the foregoing statute a school-house site, when once established, can be changed only at an annual school district meeting. There is no authority of law for changing such site at a special election. Therefore, the vote on the question of lo-

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cation taken on March 28 was illegal and void, and conferred no power or authority whatever upon the officers of the school district to move the school-house in question.

A large portion of the brief of plaintiffs in error is devoted to the discussion of the proposition that a court of equity has no power or jurisdiction to restrain the holding of an election which is authorized by law, and that a party is not liable for contempt of court for disobeying an injunction order enjoining an election legally called for a lawful purpose, for the reason that such order is absolutely null and void. The authorities cited in the brief fully sustain the proposition for which counsel contend, but the doctrine stated has no application to the case under consideration. Here there was no attempt to interfere with, or to restrain, the holding of an election in the district for the relocation of the school-house site. Nor were the plaintiffs in error adjudged guilty of contempt on account of any vote taken in the district upon the question of relocation, but because they removed the school-house contrary to, and in defiance of, the order of the district court. It is one thing to prevent an authorized election by enjoining the election officers, and it is quite another and different thing to test the validity of an election, after the same has been held, by restraining a public officer from carrying into effect the will expressed by the electors. A court of equity has jurisdiction in the latter case, while in the former it is powerless to interfere by injunction.

The plaintiffs in error insist that the site for the school-house was legally changed by the district at the annual election, and it, therefore, became their duty to move the building to the new location, notwithstanding the order of injunction. Whether the school-house site was lawfully located at the election held on June 27 depends upon whether the northwest corner of section 8, the place where the building has stood for years, was three-quarters of a

mile, or more, from the geographical center of the district, since, if that be a fact, a majority vote of the qualified voters present at such election was sufficient to change the site to a place nearer the center of the district; otherwise it was necessary that the proposition should have received the affirmative vote of two-thirds of the electors of the district who participated at the meeting. There is a dispute between counsel for the respective parties as to how far the original site is from the geographical center of the district, and it is not an easy matter to decide owing to the irregular shape of the district. Assuming, for the purposes of this case, that the site for the school-house was relocated in the manner provided by law at the annual election, nevertheless that did not justify the plaintiffs in error in moving the building in violation of the writ or order of injunction theretofore granted, although the fact that the site was legally changed by the district, subsequent to the granting of the injunction, would have been sufficient ground for the vacation or dissolution of the injunction by the court had application therefor been made. The authorities agree that a party need not obey a void injunction order, but if the order is valid it must be respected, though irregular or erroneously issued, until it is vacated by the court allowing it, or reversed in the appellate tribunal by some appropriate method of direct review in the same action. The rule is thus stated in 2 High, Injunctions, sec. 1416: "With whatever irregularities the proceedings may be affected, or however erroneously the court may have acted in granting the injunction in the first instance, it must be implicitly obeyed as long as it remains in existence, and the fact that it has been granted erroneously affords no justification or excuse for its violation before it has been properly dissolved. And the party against whom an injunction issues will not be allowed to violate it on the ground of want of equity in the bill, since he is not at liberty to speculate upon the intention or decision of the court, or upon the equity of the bill, or to

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question the authority of the court to grant relief upon the facts stated, except upon application to dissolve the injunction. So if defendant is in doubt as to the scope or extent of the injunction he should not willfully disregard or violate it with a view of testing such questions, but should apply to the court for a modification or construction of its order. And upon proceedings for contempt in this class of cases the only legitimate inquiry is whether the court granting the injunction had jurisdiction of the parties and of the subject-matter, and whether it made the order which has been violated, and the court will not, in such proceedings, consider whether the order was erroneous."

In the case under review the court below had jurisdiction of the subject-matter and of the plaintiffs in error. The injunction was properly granted and personally served upon them. They knowingly disregarded the mandate of the court, and are, therefore, liable to punishment for contempt, notwithstanding, under the showing made, they would have been entitled to a dissolution of the injunction upon a motion filed for that purpose, or upon a trial upon the merits. (*State v. Pierce*, 32 Pac. Rep. [Kan.], 924; *Forrest v. Price*, 29 Atl. Rep. [N. J.], 215; *Erie R. Co. v. Ramsey*, 45 N. Y., 637.) That they were actuated by the best of motives in doing what they did affords no warrant or excuse for disobeying the injunction, nor does it relieve them from punishment for its violation. The court doubtless, and properly so, took the facts in the case into consideration in fixing the penalty. True, the injunction order was allowed by the county judge, yet the breach of its terms was a contempt against the district court, and not the county judge. This was held in *Johnson v. Bouton*, 35 Neb., 898. The decision of the court below is right, and is

AFFIRMED.

PHENIX INSURANCE COMPANY OF BROOKLYN, NEW
YORK, v. JOHN A. ROLLINS.

FILED APRIL 16, 1895. No. 5964.

1. **Insurance: PREMIUM NOTES: DEFAULT: SUSPENSION OF POLICY: WAIVER.** A clause providing that an insurance policy shall be suspended during the time the premium note shall remain unpaid after maturity is for the benefit of the company, and may be waived by the insurer.
2. ———: ———: ———: ———: ———. A fire insurance policy for the term of five years at a gross premium for the entire time, the insured giving his note for such premium, due in one year from date, contained a stipulation to the effect that the failure by the insured to pay the premium note when due suspended the policy during such default, but that a subsequent payment of the premium in full revived the policy for the remainder of the term. The defendant made default in the payment of such note, and in an action thereon it was *held* that the company was entitled to recover the full amount of the note.

ERROR from the district court of Lancaster county.
Tried below before TUTTLE, J.

The facts are stated in the opinion.

A. G. Greenlee, for plaintiff in error:

The provision for suspending the policy in case of default in payment of the premium note is not unreasonable. (*Phoenix Ins. Co. v. Bachelder*, 32 Neb., 490; *St. Paul Fire & Marine Ins. Co. v. Coleman*, 43 N. W. Rep. [Dak.], 693; *Williams v. Albany City Ins. Co.*, 19 Mich., 465.)

The judgment of the court below is in violation of the principle that parties have the right to make their own contract, and that where one party does all he agreed to do, and gives all that he agreed to give, he has a right to enforce the contract against the other party. (*Fleetwood v. Dorsey Machine Co.*, 95 Ind., 491; *St. Paul Fire & Marine Ins.*

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Co. v. Coleman, 43 N. W. Rep. [Dak.], 693; *Williams v. Albany City Ins. Co.*, 19 Mich., 451; *Minnesota Farmers Mutual Fire Ins. Association v. Oleson*, 44 N. W. Rep. [Minn.], 672.)

The plaintiff is entitled to recover the full amount of the note. (*American Ins. Co. v. Klink*, 65 Mo., 78; *Phoenix Ins. Co. v. Lansing*, 15 Neb., 494; *American Ins. Co. v. Henley*, 60 Ind., 515; *Shimp v. Cedar Rapids Ins. Co.*, 16 N. E. Rep., [Ill.], 229; *Robinson v. German Ins. Co.*, 11 S. W. Rep. [Ark.], 686; *Williams v. Albany City Ins. Co.*, 19 Mich., 451; *Blackerby v. Continental Ins. Co.*, 15 Ins. L. J. [Ky.], 756.)

Davis & Hibner, contra:

The insurance company can only recover the amount of premium actually earned. (*Yost v. American Ins. Co.*, 39 Mich., 531; *Mathews v. American Ins. Co.*, 40 O. St., 135; *American Ins. Co. v. Stoy*, 41 Mich., 385.)

NORVAL, C. J.

This suit is on a promissory note for the sum of \$40, bearing date July 10, 1887, due in one year, made by the defendant in payment of the premium upon a policy of fire insurance issued to him by the plaintiff. Upon the trial the court rendered judgment against the defendant for the sum of \$19.28. To review this judgment is the object of this proceeding. The only contention here is that the verdict is contrary to the law and the evidence. The cause was tried and decided in the court below upon the following stipulation of facts:

"It is admitted that the defendant executed the note hereto attached, and that the consideration for said note was the execution and delivery to the defendant by plaintiff of a policy of insurance, a copy of which is hereto attached, and marked 'Exhibit B;' that the defendant duly received said policy, and has at all times since said day re-

tained possession of the same; never offered to surrender it to the plaintiff, or to any one for it, nor has it ever been demanded from the defendant by the plaintiff; that the defendant, at the time of the execution and delivery of the said note and the receipt of the said policy, was fully advised as to the provisions and conditions of the said papers.

“It is further stipulated that the usual, customary, and reasonable price of the insurance mentioned in the policy, if taken for one year only, would be \$13.33, but that in the consideration of the defendant taking the policy for five years the plaintiff agreed to insure said defendant for five years for the amount of three years' premium if taken for a single year.

“It is further stipulated that the plaintiff duly issued the said policy and delivered the same to the defendant; has never canceled the same, but at all times since the said note became due has endeavored to collect the same, and that if the defendant has not had insurance for the full term of five years, as stated in said policy, it is wholly due to the fact of the failure of the defendant to pay the said note, taken in connection with the conditions in said note and policy.”

The note, which is the foundation of the suit, contained this clause: “If this note is not paid at maturity, said policy shall then cease and determine, and be null and void, and so remain until the same shall be fully paid and received by said company.”

The following condition appears upon the face of the policy of insurance: “In case the assured fails to pay the premium note or order at the time specified, then this policy shall cease to be in force, and remain null and void during the time said note or order, or any part thereof, remains unpaid after its maturity; and no legal action on the part of this company to enforce payment shall be considered as reviving the policy; the payment of the premium in full, however, revives the policy and makes it good for the balance of its term.”

If we correctly understand the argument of counsel for defendant it amounts to this: That by virtue of the foregoing provision contained in the policy and the stipulation in the note, the insurance terminated upon default being made in the payment of the premium note, and the insurance having ceased in favor of the plaintiff at the maturity of the note, the premium likewise ceased to accrue against the defendant. This is, doubtless, the view adopted by the trial court. If this is the proper construction to be placed upon the clauses quoted above, when read in the light of the facts in the case, the decision is right, otherwise the judgment must be reversed. By the terms of the contract the policy was voidable upon the defendant making default, but voidable merely at the option of the company. The condition declared the insurance suspended during default of payment of the premium note. The provision was inserted in the policy for the sole benefit of the insurer and not the insured, and is valid and binding. This stipulation could be waived by the company. This was decided in *Phenix Ins. Co. v. Bachelder*, 32 Neb., 490, and the same doctrine is held by other courts. (*Zinck v. Phoenix Ins. Co.*, 60 Ia., 266; *Mehurin v. Stone*, 37 O. St., 58; *Palmer v. Sawyer*, 114 Mass., 13.) It appears that this defendant has retained the policy and never offered to surrender it, and that plaintiff has at all times since the maturity of the note endeavored to enforce the collection of the note, and brought this action for that purpose. As to what acts have been construed as a waiver of conditions in a policy similar to the one in this case, see *Johnson v. Southern Mutual Life Ins. Co.*, 79 Ky., 403; *East Texas Fire Ins. Co. v. Perkey*, 24 S. W. Rep. [Tex.], 1080; *Brady v. Prudential Ins. Co.*, 29 N. Y. Sup., 44; *Western Horse & Cattle Ins. Co. v. Scheidle*, 18 Neb., 495; *Nebraska & Iowa Ins. Co. v. Christensen*, 29 Neb., 572; *Phenix Ins. Co. v. Dungan*, 37 Neb., 469. In the last case the stipulations in the premium note and policy were the same as in the case be-

fore us. After the maturity of the note a payment was made thereon and the note was left with an agent for collection. Before the note had been fully paid, the property covered by the policy was destroyed by fire. In an action to recover for the loss it was held (we quote from the syllabus): "That the policy was voidable only at the election of the insurance company, and that by receiving and retaining the part payment after the default and retaining the note for collection it waived the right to insist upon a forfeiture thereof." Whether had a loss occurred after the maturity of the note in question, and an action had been brought to recover upon the policy, the company could have interposed as a defense that the note had not been paid it is unnecessary to now decide, as the determination of such question adversely to the company would not defeat its action upon the note. As elsewhere stated, the clause contained in the policy was intended for the protection of the company merely. To permit the defendant to insist that the contract of insurance terminated by his own failure to pay the note would allow the insured to take advantage of his own laches or wrong, which the law will not sanction. The defendant contracted to pay the plaintiff \$40 for carrying the risk on his property for the full period of five years, with the contingency, thoroughly understood at the time, that the insurance might be suspended by the failure of the insured to pay the premium when due. There is no stipulation releasing the defendant from the payment of any portion of the note in case he should fail to comply with the contract. The company has furnished and the defendant has received all the contract required. The insured could have continued the policy in force for the five years, had he chosen to do so, by paying the note according to its terms. The company acquired a present vested right in the premium as an entirety immediately upon the execution and delivery of the note and policy. The failure of the assured to pay the note did not

render the policy absolutely void, but merely suspended it during the continuancy of the default. A voluntary or enforced payment of the premium would have the effect to revive the policy for the remainder of the original term of the risk. We are fully satisfied that plaintiff is not restricted to a recovery of such part of the premium as equaled the customary short rates for one year's insurance, but it was entitled to collect the full amount of the note. The construction we have placed upon the stipulations of the parties is sustained by the following authorities: *American Ins. Co. v. Klink*, 65 Mo., 78; *Robinson v. Insurance Co.*, 51 Ark., 441; *American Ins. Co. v. Henley*, 60 Ind., 515; *St. Paul Fire & Marine Ins. Co. v. Coleman*, 43 N. W. Rep. [Dak.], 693; *Continental Ins. Co. v. Boykin*, 25 S. Car., 323; *Continental Ins. Co. v. Hoffman*, 25 S. Car., 327; *Minnesota Farmers Mutual Fire Ins. Association v. Oleson*, 44 N. W. Rep. [Minn.], 672.

The defendant relies upon three cases to justify his position, namely, *Yost v. American Ins. Co.* 39 Mich., 531, *American Ins. Co. v. Stoy*, 41 Mich., 385, and *Matthews v. American Ins. Co.*, 40 O. St., 135. These cases are not like the one under consideration. In each a note payable in annual installments was given for the premium, each installment being a premium for a distinct year's insurance. The policy stipulated that, if any installment was not paid at maturity, the policy should be null and void until payment was made. It was held that the insurance was not for a term of years, but as an annual insurance renewable each year for a period not exceeding such term, the policy was void so long as there was any default in the payment of any installment, and that no recovery could be had for successive installments of the premium. In the case before us the defendant agreed to pay a gross sum as premium for the carrying of the risk for the full period of five years, subject to the provisions of the policy. In the Ohio case two of the judges dissented, and the Michi-

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gan court in *Williams v. Albany City Ins. Co.*, 19 Mich., 451, and *Canfield v. Continental Ins. Co.*, 47 Mich., 447, in continuing an insurance policy purporting to be for five years containing a stipulation that upon the non-payment at maturity of any installment note given for the premium the policy should be void until revived and the whole amount of installments remaining unpaid should be considered earned, decided that the insured was liable upon the installment notes, thereby recognizing the law as we have stated it to be.

The findings and judgment of the district court are reversed, and the cause remanded.

REVERSED AND REMANDED.

ALBERT BUSHNELL V. CHARLES M. CHAMBERLAIN
ET AL.

44 751
60 548

FILED APRIL 16, 1895. No. 6368.

1. **Action for Value of Goods Sold: JUDGMENT FOR DEFENDANTS: EVIDENCE.** Evidence held to support the verdict and judgment.
2. **Instruction.** The refusal to give an instruction is not reversible error where the court has already stated substantially the same principle of law in another instruction.

ERROR from the district court of Johnson county. Tried below before BABCOCK, J.

S. P. Davidson, for plaintiff in error.

T. Appelget, contra.

NORVAL, C. J.

This action was instituted in the court below by the plaintiff in error against Charles M. Chamberlain, James

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R. Tober, and Charles M. Wilson, formerly partners under the firm name of the Cook Lumber Company, to recover the price and value of two cars of oak lumber alleged to have been sold and delivered by the plaintiff to the Cook Lumber Company. There was a trial to a jury, with a verdict and judgment in favor of the defendants.

It is contended that the evidence fails to support the verdict. Plaintiff resides at, and is engaged in the lumber business in, Kansas City, Missouri. For more than a year subsequent to April, 1890, the firm of Munson & Walker owned a lumber yard in the city of Lincoln, and during that time the plaintiff sold the firm on an average of about two cars of lumber per week, and the Cook Lumber Company also purchased a few car loads of lumber of Munson & Walker during the same period. The last named firm went out of business prior to February, 1892, but the members of the Cook Lumber Company were not aware of that fact until several weeks thereafter. In February, 1892, the last named company sent an order to Munson & Walker for two car loads of oak lumber, and some two weeks later, without further correspondence, the Cook Lumber Company received the same, believing that the order had been filled, and the shipment made, by Munson & Walker. The Cook Lumber Company held a note against said firm, and credited thereon the price of the lumber before the company had been apprised of the dissolution of the firm of Munson & Walker, or that the plaintiff claimed to have furnished the lumber in dispute. The testimony introduced on behalf of the plaintiff tends to show that during the last of February, 1892, he made arrangements with C. C. Munson, late of the firm of Munson & Walker, to act as his agent in the sale of lumber in Nebraska upon commission; that thereafter Mr. Munson placed an order with the the plaintiff for two car loads of oak lumber to be shipped to the Cook Lumber Company, which order was filled and the lumber shipped about the

4th of March following; that neither Walker nor Munson had any interest in said lumber, but in making out the invoice a mistake was made in having it billed to the Cook Lumber Company as sold by Munson individually, instead of by him as agent for plaintiff. It is undisputed that plaintiff has not received pay for any part of the shipment, excepting the freight on each car, which was deducted from the invoice. There was testimony on the part of the defendants conducing to show that they never ordered or purchased any lumber of the plaintiff or Mr. Munson, and that they never knowingly received any lumber from either of them. The invoice for the shipment was made out and dated in Lincoln, instead of Kansas City, the point from which it is claimed the lumber was shipped. There is no explanation given of this, or how the alleged mistake in the invoice occurred. No bill was ever rendered the defendants by the plaintiff for the material in dispute. While the evidence is not of the most satisfactory character, we cannot say that the verdict is clearly wrong, although we would have been as well content had the jury found for the other party.

Error is assigned because the trial court suppressed from the depositions of the plaintiff and Munson the evidence relating to the assignment by the latter to the former of the account for the lumber in controversy. We are unable to discover any prejudicial error in the ruling. The issue to be tried was whether the lumber was sold and delivered by plaintiff to the defendants. If it was, and by mistake the material was billed as having been sold by Munson, it required no formal assignment of the account to Mr. Bushnell by Munson in order to entitle the plaintiff to recover in the action. Therefore, the fact that there was a written assignment of the account is not important or material.

Complaint is made of the giving of this instruction: "If you find from the evidence that the defendants pur-

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chased the bill of lumber charged in the petition from some other person or firm other than the plaintiff, and before receiving any knowledge of the claim of plaintiff in this lumber, and in good faith paid for the same to the person from whom they purchased, before they had any knowledge of plaintiff's claim in the lumber, then defendants would not be liable to plaintiff for said lumber." The vice imputed to this instruction is that it is not based upon the evidence—is not well taken. It assumed no fact not fairly within the testimony.

Exceptions were taken to the refusing of the plaintiff's first and second requests to charge, which are as follows:

"1. The court instructs the jury that if you believe from the evidence that the plaintiff sold the defendant, the Cook Lumber Company, the lumber mentioned in his petition through C. C. Munson, as agent, and that said lumber has not been paid for to the plaintiff, then the mere fact that said agent by mistake billed the lumber to the Cook Lumber Company as though it had been sold by him individually and not by plaintiff is no defense to this action. The further fact, also, that said Cook Lumber Company supposed they were buying the lumber from said C. C. Munson individually and not from the plaintiff through him as agent is no defense in this action.

"2. The court further instructs the jury that if they believe from the evidence that the plaintiff, being the owner of the lumber and the materials mentioned in the petition, sold the same to the Cook Lumber Company through his agent, C. C. Munson, and that said Cook Lumber Company has not paid for the same to said plaintiff and that said lumber was delivered to the said Cook Lumber Company as alleged, then you will find for the plaintiff and assess his damages at what you believe from the evidence he is entitled to recover."

Although not couched in the same language, the court, by the first instruction substantially covered the same

Scott v. Burrill.

ground. In that instruction the court told the jury, in effect, that if they found from the evidence that the plaintiff by himself, or his duly authorized agent, delivered to the defendants the two cars of lumber and they used the same, the verdict should be for the plaintiff. The court having already stated the law of the case as enunciated in the plaintiff's requests, it was not reversible error to refuse to reiterate the same. (*Kopplekom v. Huffman*, 12 Neb., 95; *Binfield v. State*, 15 Neb., 484; *Bradshaw v. State*, 17 Neb., 147; *Hodgman v. Thomas*, 37 Neb., 568; *Murphy v. Gould*, 40 Neb., 728.) The judgment is

AFFIRMED.

SHADE SCOTT V. ALEXANDER BURRILL.

FILED APRIL 16, 1895. No. 5929.

1. **Appeal from Justice of the Peace: PROCEDURE IN APPELLATE COURT.** Where a party to a judgment rendered by a justice of the peace files an undertaking for an appeal within ten days after the date of the judgment, but fails to file a transcript of the proceedings in the district court within thirty days next following the rendition of the judgment, the appellee may file such transcript, and have the cause docketed; and the district court is authorized, on his motion, either to dismiss the appeal, or enter judgment in his favor similar to that rendered by the justice. *Wilde v. Preuss*, 33 Neb., 790, followed.
2. ———: ———: **REPLEVIN.** The above rule applies to actions of replevin before a justice of the peace, as well as to all other civil causes determined in justice courts.
3. **Replevin: JUDGMENT: HARMLESS ERROR.** Where judgment is entered in favor of the defendant in an action of replevin merely for damages for withholding the property and costs, the plaintiff cannot complain that no judgment was rendered against him, either for a return of the property, or for the value thereof, in case a return cannot be had, or the value of the possession of the same. In such case the failure to render an alternative judgment is error without prejudice to the plaintiff.

ERROR from the district court of Cedar county. Tried below before NORRIS, J.

Miller & Ready, for plaintiff in error.

John Bridenbaugh, contra.

NORVAL, C. J.

Plaintiff in error brought replevin before a justice of the peace to recover possession of seven head of cattle. The property was taken under the writ and possession thereof delivered to plaintiff. Upon the trial, which was held on March 30, 1892, the justice found the issues against the plaintiff and assessed the defendant's damages in the sum of \$5, for which amount, with costs of suit, judgment was rendered. Within ten days the plaintiff entered into and filed with the justice an appeal undertaking, but failed to perfect his appeal by filing the transcript of the proceedings in the district court of the county within the time prescribed by law. More than thirty days after the entry of the judgment the defendant filed a transcript, had the same docketed in the district court, and at the first term of the court held thereafter, on motion of the appellee, a judgment was entered in his favor similar to that rendered by the justice, in accordance with the provisions of section 1011 of the Code of Civil Procedure.

The petition in error contains but a single assignment, namely, that the district court erred in sustaining the motion of the defendant to enter up the judgment in his favor. There is no error in the decision. The proceedings in the district court were in strict compliance with the provisions of said section 1011 of Civil Code and the decisions of this court thereunder. (*Wilson v. Wilson*, 23 Neb., 455; *Slaven v. Hellman*, 24 Neb., 646; *Wilde v. Preuss*, 33 Neb., 790.) The appellee was entitled, at his option, either to a judgment of dismissal, or one similar to that rendered by

the justice. Section 1011 applies to actions in replevin tried before justice courts.

The point is urged that the judgment entered by the justice was not in the alternative, for a return of the property, or the value thereof, in case a return could not be had, as required by section 191a of the Code. No judgment was rendered for either the value or for a return of the property, but merely for damages for the withholding of the property, therefore the plaintiff was not prejudiced by the failure to render an alternative judgment. Had a judgment been entered in favor of the defendant for the value of the property, or the value of the possession of the same, without making provision for returning the property in lieu of the value, it would have been erroneous.

Again, the plaintiff did not prosecute error to the district court, but appealed, which cured all errors in the proceedings before the justice. The judgment of the district court is

AFFIRMED.

LYNDON A. GEORGE V. STATE OF NEBRASKA.

FILED APRIL 16, 1895. No. 7540.

- 1. Criminal Law: REVIEW: SUFFICIENCY OF EVIDENCE: OPINION OF ATTORNEY GENERAL.** Ordinarily, a judgment of conviction in a criminal prosecution will be reversed whenever the attorney general, after an examination of the record, declines to submit a brief in behalf of the state on the ground that such judgment is not supported by the evidence.
- 2. Rape: SUFFICIENCY OF EVIDENCE.** Evidence examined, and *held* not to sustain a conviction on the charge of rape.

ERROR to the district court for Lancaster county. Tried below before HALL, J.

44	757
46	117
44	757
53	463

Stearns & Strode, for plaintiff in error.

A. S. Churchill, Attorney General, for the state.

Post, J.

The plaintiff in error, Lyndon A. George, was, at the January, 1895, term of the district court for Lancaster county, convicted of the crime of rape, and which judgment is presented for review by the petition in error addressed to this court.

The prosecutrix, Amelia Barth, a young woman, twenty-seven years of age, and of average strength and intelligence, was, on the night in question, a visitor at the home of the accused in the village of College View, one of the suburbs of the city of Lincoln. On her departure the accused started to accompany her to the street car by which it was her purpose to return to the city. When about eighty rods from the street car line she discovered that the car which she was intending to take had started. The accused then offered to accompany her to the Fourteenth street line at a point near the penitentiary, nearly, if not quite, two miles distant, and most of the way across the open prairie. This offer the prosecutrix readily accepted, instead of waiting for the next car from College View to the city, and during this walk the alleged rape was committed. The sexual act is not denied by the accused, the only point of difference between the parties concerned relating to the degree of force, if any, which was used by him.

The attorney general, with a frankness highly to be commended, assures us that he is unable, after a diligent examination of the record, to discover any sufficient evidence upon which to sustain the conviction, and has accordingly declined to submit a brief in behalf of the state. A judgment of reversal would under the circumstances be fully warranted without a reference to the record, but out of

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abundance of caution we have read over all of the evidence in the bill of exceptions and are quite satisfied with the conclusion of the attorney general. To set out the nauseous details as testified to by both the prosecutrix and the accused is entirely unnecessary. It is sufficient to say that after being ravished as she claims the former requested the accused to take her back to his house, as she preferred to stay over night with his daughter to going into the city, and that she accepted from him the sum of seventy-five cents, apparently as the price of her virtue, which sum he by request carried for her until they reached the street car line, when it was returned to and retained by her. There is evidence tending to sustain the allegations of the information, but when viewed in connection with the facts above narrated must be held insufficient upon which to base a judgment of conviction. The judgment is accordingly reversed and the cause remanded for further proceedings in the district court.

REVERSED AND REMANDED.

MARY L. WANSEER ET AL. V. ROBERT LUCAS.

FILED APRIL 16, 1895. No. 6447.

1. **Fraudulent Conveyance: DEED FROM HUSBAND TO WIFE:**

CONSIDERATION. A conveyance of real property from a husband directly to his wife, although void at common law, may be sustained if resting upon equitable grounds, such as a sufficient money consideration.

2. ———: ———: ———: **EVIDENCE.** Evidence examined, and the advancement of money to the husband by the wife out of her separate estate held a sufficient consideration for the conveyance to her by the former of all his property, real and personal.

3. **Ejectment: DEFENSE.** The defendant in an action of ejectment may interpose any defense, legal or equitable, the effect of which is to negative the plaintiff's right of possession.

44	759
49	632
52	327
52	598
52	649
53	158

44	759
57	490

ERROR from the district court of Pierce county. Tried below before NORRIS, J.

O. J. Frost and Wigton & Whitham, for plaintiffs in error.

H. C. Brome, contra.

Post, J.

This is a petition in error and presents for review a judgment from the district court of Pierce county. The essential facts as they appear from the pleadings and proofs are as follows: On the 29th day of September, 1876, R. S. Lucas, late of said county, conveyed by warranty deed to his wife, Ada W. Lucas, the south half of the northwest quarter and the north half of the southwest quarter of section 34; the north half of the northwest quarter and the north half of the northeast quarter of section 35; the undivided one-half of the north half of the northeast quarter, and the south half of the southeast quarter of section 27; the undivided north half of the southeast quarter of section 34; the undivided half of the north half of section 26, and a half interest in the townsite of Pierce, all situated in township 26, range 2 west, in said Pierce county, beside the grantor's personal property of every description, including moneys and credits, for the expressed consideration of \$100. The value of the property above described, including a balance in bank of about \$500 and some \$1,200 in county warrants, was from \$12,000 to \$15,000. Said Lucas, who died in the month of November, 1877, left surviving him ten children, the fruits of his marriage with the said Ada W., ranging from two to twenty years of age. His widow was soon thereafter married to Amos W. Seeley, who died some time prior to the 29th day of December, 1884, the exact date of his death not being shown by the record, leaving one child the fruit of said marriage. On the day last named said widow, by written lease, conveyed a por-

tion of the premises above described to the defendant in error Robert Lucas, who is one of the children and heirs at law of R. S. Lucas deceased, for the period of ten years from and after said date. This action was subsequently brought by the plaintiffs, as tenants in common, to assert their rights to said property as heirs of R. W. Lucas, claiming that the conveyance first above mentioned and also the said lease are void and ineffectual for the purpose of passing title or conferring any right of possession as against them.

The cause as presented to the district court involved several interesting and important questions which are not necessarily included in the present investigation, and will not, therefore, receive more than a passing notice.

It is argued by the plaintiffs: (1.) That the deed from R. S. to Ada W. Lucas was never delivered in such manner as to give effect thereto as a conveyance of real estate. (2.) It was made in lieu of a will to take effect, if at all, after the death of the grantor. (3.) If delivered as claimed, it was made with intent to provide for the grantor's wife by conveyance of all his property, with nothing reserved for his children, a provision unreasonable and, therefore, void. Mr. Lucas, at the date of the deed, was contemplating a visit to the Centennial Exposition at the city of Philadelphia, and there is evidence strongly tending to prove that he was possessed by a morbid fear, amounting almost to a conviction, that he would not live to return. There is also evidence which would warrant the inference that the conveyance was originally intended rather as a testamentary disposition of the property therein mentioned, to take effect after the death of the grantor. Mrs. Lucas, it should be remarked, died some time previous to the commencement of this action, and the question of the understanding between herself and her husband at and before the execution of the deed is left in doubt. The defendant, who was then a member of his father's family, testified as follows: "I

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think the day before my father started to the Centennial he handed the deed over to my mother and said, 'Here, Ada, is the deed. I have turned everything over to you, and in case I die, or anything happens to me, you will have no trouble.' * * * Mother took the deed, saying: 'O, there is not going to anything happen to you.'" But whatever may have been the intention of the grantor at the time to which we have referred, there is evidence of a subsequent delivery with intent to invest the grantees with the legal and equitable title to the property in controversy. To Mr. Frady, who accompanied him on his visit to Philadelphia, he remarked after his return that he intended to leave the deed in force—that Mrs. Lucas should keep the family together; and about three weeks before his death he remarked to the witness, in the presence of Mrs. Lucas, that he had conveyed the homestead, together with the other property, to his wife, and that the details were all fixed. Mr. Hall, a neighbor and intimate acquaintance, testified that Mr. Lucas assured him during his last sickness, and about a month before his death, that everything (referring to his property) was fixed up in the event of his death, and that Mrs. Lucas, who was present at the time, got the deed and showed it to the witness. J. H. Brown, who had for several years been engaged with Mr. Lucas in business, and through whom the latter acquired title to most of the real estate conveyed, testified to a conversation with him, Lucas, a few days previous to the execution of the deed, in which he remarked to the witness that he was about to convey his property to his wife; that her money had paid for it, and that it in equity belonged to her. He testified further that the lands described, with the exception of the grantor's homestead, were paid for by the proceeds of drafts drawn in favor of Ada W. Lucas, and which, according to information derived from the husband of the latter, represented her interest in the estate of her father, who died some time previous thereto in the state of Iowa.

There is other evidence tending to prove the possession by Mrs. Lucas of property in her own right derived from the source above mentioned. It is also shown that after her removal with her husband to Pierce county, in the year 1871, she taught school a considerable part of each year, and that her earnings therefrom amounted to nearly, if not quite, \$1,100, which, with the exception of about \$200, was used to defray the expenses of the family. To Mr. Robertson, in a conversation two or three months before his death, Lucas stated that he had conveyed all of his property, real and personal, to his wife; that the purpose of such conveyance was to prevent a disposition thereof by the probate court, and that he preferred to dispose of it himself. The evidence of plaintiffs tends to sustain each of the propositions asserted by them, and would, it may be conceded, have supported a finding in their favor; but the district court having determined the issues in favor of the defendant, we can perceive no sufficient ground upon which to interfere.

The doctrine has been freely asserted by this court that the deed of a husband to his wife, although void at common law, will be upheld whenever equitable grounds exist therefor, such, for instance, as a valuable consideration. (*Smith v. Dean*, 15 Neb., 432; *Johnson v. Vandervort*, 16 Neb., 144; *Furrow v. Athey*, 21 Neb., 671; *Ward v. Parlin*, 30 Neb., 376; *Hill v. Fouse*, 32 Neb., 637.) In *Furrow v. Athey*, a case quite similar to the one before us, the court, by REESE, J., after holding the money received by the grantor from his wife's separate estate to be a sufficient consideration for the deed to her, says: "But aside from this we can see no reason why the decree of the district court is not correct. It appears that in 1868 Charles Furrow, the husband, now deceased, purchased the land in question from the United States. At that time he with defendant, his wife, settled upon it and resided there together until his death, which occurred in 1880. In 1879, while in

poor health, he conveyed the premises to her. It was their home. They had a family of children, the plaintiffs, and the deed was evidently executed to her in order that she might be enabled to rear and educate the family, in which she was as much interested as the husband, and which he fully understood at the time he made the conveyance. If it had been made to a third party as a trustee, and by him conveyed to defendant, it perhaps would never have been questioned. It is just as good without such intervention." The foregoing language is quite as applicable to the facts of the case as found by the district court, and must be regarded as decisive of the question under consideration.

It is alleged by defendant, and not seriously disputed, that 160 acres of the premises in controversy, to-wit, the south half of the northwest quarter and the north half of the southwest quarter of section 35, was in the deed of R. S. Lucas by mistake described as the corresponding subdivision of section 34. Plaintiffs' counsel treat the answer as an application for a reformation of said deed, although we find no prayer therefor, and argue that such relief should be denied for two reasons: (1.) The conveyance from R. S. Lucas was purely voluntary and will accordingly not be corrected by a court of equity without the consent of all parties interested. (2.) The defendant's claim comes too late after an interval of thirteen years. Referring to the first contention, it is sufficient to say that the district court, as we have seen, evidently found that the money received by Lucas from his wife's separate estate was a sufficient consideration for the conveyance, and that it cannot be regarded as voluntary within the meaning of the authorities to which we are referred by counsel. As to the second contention, it may be said that Mrs. Lucas took possession of the 160 acres in question soon after the death of her said husband, and asserted title thereto continuously until the time of her death, more than ten years later. In the year 1884, in an action in the district court of Pierce

county in which the said Ada W. Lucas, then Seeley, was plaintiff and Woods Cones, administrator of the estate of the said R. S. Lucas, was defendant, a decree was entered correcting said deed so as to include the property above described in section 35. It is claimed, and may be conceded, that the decree mentioned is void as against the heirs of the said R. S. Lucas. The fact of the decree is, however, material, as bearing upon the contention that said claim is now too stale for cognizance by a court of equity. *Johnson v. Vandervort*, *supra*, relied upon by plaintiffs in this connection, is not in point: (1.) Because there was therein no consideration or other equitable grounds upon which to sustain the conveyance. (2.) There was no attempt by the wife to assert any claim of title or otherwise under the deed for more than seventeen years after its execution. We have no doubt that Mrs. Lucas, had she survived, might successfully interpose her equitable title as a defense to an action of like nature by these plaintiffs. (*Dale v. Hunneman*, 12 Neb., 221; *Stalcy v. Housel*, 35 Neb., 160.) And her title at the date of the lease is available to the defendant in this action.

There is a further contention, viz., that the defendant failed to perform the conditions of the lease by the furnishing of vegetables and other provisions to Mrs. Lucas as stipulated therein, and that he must therefore be "deemed holding over his term." (Civil Code, sec. 1021.) It does not appear, however, that any complaint was ever made by the party most concerned during her lifetime, and the terms and conditions of the lease or the manner of their performance cannot, for the purpose of this action, be of interest to the plaintiffs, since they claim through their father, R. S. Lucas, and in effect disclaim any title derived through their mother. The judgment must, for reasons stated, be

AFFIRMED.

44	766
48	858
44	766
48	819
44	766
54	291
55	337
44	766
58	301

MAGNUS WEBER V. FREEMAN P. KIRKENDALL ET AL.

FILED APRIL 16, 1895. No. 5050.

1. **Review: FINDINGS OF COURT: MOTION FOR NEW TRIAL.** A motion for a new trial is as essential to a review in this court by petition in error, where the judgment or order complained of is based upon findings of the court, as upon the verdict of a jury.
2. **Motion for New Trial.** Primarily the office of a motion for a new trial is to afford the court an opportunity to correct errors in its own proceedings without subjecting parties to the expense and inconvenience of appeal or petition in error.
3. **Courts: POWER TO CORRECT ERRORS.** The power to correct errors in their own proceedings is inherent in all courts of general jurisdiction, and in the exercise of that discretion they are governed not alone by this solicitude for the rights of litigants but also by considerations of justice to themselves as instruments provided for the impartial administration of the law.
4. **Review: DISCRETION OF TRIAL COURT.** A stronger case will be required for interference by this court on account of an order setting aside a verdict resulting in a second trial on the merits of a cause than where the motion therefor is denied. (*Bigler v. Baker*, 40 Neb., 325.)
5. **Payment: DURESS.** Payments or concessions exacted from the owner of property unlawfully withheld, in order to obtain possession thereof, where the detention is accompanied by immediate hardship or irreparable injury, may be avoided on the ground of compulsion, although not amounting to technical duress. (*Fitzgerald v. Fitzgerald & Mallory Construction Co.*, 44 Neb., 463.)
6. ———: ———. But one threatened with civil process, unaccompanied by any act of hardship or oppression, is required to make his defense in the first instance to the merits of the claim, and cannot postpone litigation by paying the demand and afterward maintain an action therefor.

REHEARING of case reported in 39 Neb., 193.

Charles W. Haller, for plaintiff in error.*Montgomery, Charlton & Hall*, contra.

Post, J.

A judgment of reversal was entered in this court at the January, 1894, term (see 39 Neb., 193); but a rehearing was thereafter ordered upon discovering that a material part of the record had been overlooked by us. The essential facts are as follows: At the May, 1890, term of the district court of Douglas county a trial was had to a jury upon the issues stated in the opinion heretofore filed, resulting in a verdict for the plaintiff in the sum of \$813.02, the amount claimed by him, with interest. Afterwards, and within three days, a motion for a new trial was made by the defendants, in which the following grounds were assigned.

1. The verdict is not sustained by sufficient evidence.
2. The verdict is contrary to law.
3. Errors of law occurring at the trial, duly excepted to.
4. The court erred in giving certain instructions to which the defendants excepted.
5. The court erred in refusing to give certain instructions asked by the defendants, to which defendants duly excepted.

During the same term, but more than three days subsequent to the finding of the verdict, the defendants were permitted, over the objection of the plaintiff, to amend their motion for a new trial by specifically numbering the instructions referred to in the fourth and fifth specifications thereof. At the September, 1890, term an order was made sustaining the motion for a new trial and setting aside the verdict for the plaintiff. At the February, 1891, term the cause, again coming on for trial, was, by written stipulation, submitted to the court, a jury being waived, on the evidence taken at the previous trial, which had been preserved in the form of a bill of exceptions, duly authenticated by the trial judge. The second trial resulted in a judgment for the defendants, based upon certain findings of fact. The record shows neither a motion for a new trial,

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nor exceptions to the findings of the court, and the errors alleged all relate to the former trial, viz.:

"1. The court erred in permitting the defendants to file the amended motion for a new trial.

"2. The court erred in granting a new trial.

"3. The court erred in entering said judgment and order."

It is true an exception was noted to the entering of the judgment on the findings, but that fact alone will not entitle the plaintiff to have said judgment reviewed in this proceeding. A motion for a new trial is just as essential as the basis of proceedings in error where the final judgment or order rests upon findings by the court as upon the verdict of a jury. (*Weitz v. Wolfe*, 28 Neb., 500; *Carlow v. Aultman*, 28 Neb., 672; *Gaughran v. Crosby*, 33 Neb., 34.) The plaintiff, from his failure to interpose proper objections thereto, is presumed to have been satisfied with the findings and judgment of the district court. But assuming what cannot be conceded, that the regularity of the order setting aside the verdict is presented by this record, we discover therein no error calling for a reversal of the judgment. It will be assumed, also, for the purpose of this investigation, that the second, or amended, motion for a new trial was without authority of law, and is in fact a mere nullity. Such being the case the inference is that the order complained of is based upon the original motion, which, as we have seen, is identical with the second, except that the instructions therein referred to are not specifically numbered. Our investigation is accordingly limited to a single inquiry, viz., were the specifications of the motion sufficient to entitle the defendants to an examination by the trial court of the questions thereby sought to be raised? The important distinction between the rules applicable to petitions in error and motions for new trials is frequently overlooked.

It is the settled rule of this court that alleged errors will

be disregarded unless specifically assigned in the petition in error. But the Code, section 317, as amended in 1881, provides: "It shall be sufficient, however, in assigning the grounds of the motion [for a new trial] to assign the same in the language of the statute without further or other particularity." Primarily, the office of a motion for a new trial is to afford the court an opportunity to correct errors in the proceedings before it without subjecting parties to the expense and inconvenience of appeal or petition in error. And for that purpose the fourth and fifth assignments of the motion appear to be quite sufficient. Indeed, we do not doubt the power of the trial court to re-examine its record and to set aside a verdict on account of prejudicial error on its own motion in the absence of a request by either party. Such was the rule of the common law in *Rex v. Holt*, 5 T. R. [Eng.], 438; *Rex v. Atkinson*, 5 T. R. [Eng.], 437, note *a*; *Rex v. Gough*, 2 Doug. [Eng.], 796. Nor has the rule been changed by statute. (*Williams v. State*, 5 Mo., 480; *Simpson v. Blunt*, 42 Mo., 544; *McCabe v. Lewis*, 76 Mo., 301; *E. O. Stanard Milling Co. v. White Line Central Transit Co.*, 26 S. W. Rep. [Mo.], 704; *State v. McCrea*, 3 So. Rep. [La.], 380; Thompson, Trials, 2411.) The rule thus recognized has not only the sanction of authority, but rests upon the soundest and most satisfactory reasons. The power is inherent in all courts of general jurisdiction to correct errors committed by them which are clearly prejudicial to the parties, and their power in that respect is exercised not alone on account of their solicitude for the rights of litigants, but also in justice to themselves as instruments provided for the impartial administration of the law. Lest our position be misunderstood, we repeat that for the purpose of review by petition in error, assignments in the language of the motion in this case would be disregarded by the reviewing court as too indefinite; but as an application addressed to the trial court for a review of its own record the motion is open to no such objection.

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A stronger case will be required to warrant a reversal on account of an order setting aside a verdict resulting in a second trial on the merits of the cause than where the motion therefor is denied. (*Bigler v. Baker*, 40 Neb., 325.) Other courts have gone further and held that such an order is not reversible error unless the reviewing court can see beyond reasonable doubt that there is manifest and material error therein in a pure and unmixed question of law, and except for which it would not have been made. (*City of Sedan v. Church*, 29 Kan., 190.) In *Ryan v. Topeka Bridge Co.*, 7 Kan., 207, it was held that where error is alleged in the sustaining of a motion for a new trial it must appear affirmatively that none of the grounds of the motion are sufficient before the party complaining will be entitled to a reversal. So far as the record discloses the case presented is the ordinary one of a difference of opinion between the judge and jury regarding the effect to be given the evidence, and according to the established rule of the court the order sustaining the motion is not the subject of review. But looking further into the record we found therein sufficient ground for setting aside the verdict without regard to the sufficiency of the evidence. For instance, by paragraph No. 5, given at the request of the plaintiff, the jury were instructed as follows: "The threats to cause an attachment to issue against the property of a person when no ground for attachment exists is a threat to detain said property unlawfully." It has been frequently held, and may be accepted as sound law, that payments or concessions exacted from the owner of property unlawfully withheld, in order to obtain possession thereof, where the detention is accompanied by immediate hardship or irreparable injury, may be avoided on the ground of compulsion, although not amounting to technical duress. (See *Fitzgerald v. Fitzgerald & Mallory Construction Co.*, 44 Neb., 463, and authorities cited.) But the mere apprehension of legal proceedings, unaccompanied by

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any act of hardship or oppression, has never been held sufficient ground for the avoiding of a contract. The books, on the other hand, abound in cases holding that where the parties are on terms of equality towards each other, one threatened with civil process is required to make his defense in the first instance to the merits of the claim, and cannot postpone litigation by paying the demand and afterward maintain an action therefor. No court would be warranted in going further in protecting parties against unconscionable demands than did we in the opinion heretofore filed in this case; and yet the ground of our conclusion therein was not alone the threatened attachment, but also the detention of the plaintiff, amounting to physical restraint, and the alleged fraudulent representations with regard to his liability for the indebtedness claimed. In no possible view of the record can the order setting aside the verdict be regarded as reversible error, hence the judgment must be .

AFFIRMED.

N. O. PETERSON V. ELIZABETH LODWICK ET AL.

44	771
47	708

FILED APRIL 16, 1895. No. 5914.

1. **Replevin: PROOF.** In an action of replevin it devolves upon the plaintiff to prove the ownership of the property in controversy, alleged in the petition, his right to immediate possession thereof, and that it is wrongfully detained by the defendants.
2. ———: ———. The facts necessary to be established to entitle a plaintiff in replevin to recover must be shown to have existed at the time the action was commenced.
3. ———: ———: **DIRECTING VERDICT.** The plaintiff in this case having failed to prove facts sufficient to entitle him to recover, it was not error for the court to direct the jury to return a verdict for defendants.

ERROR from the district court of Pierce county. Tried below before ALLEN, J.

Barnes & Tyler, for plaintiff in error.

Wigton & Whitham, contra.

HARRISON, J.

On the 24th day of May, 1887, the plaintiff in error commenced an action of replevin against the defendants in error in the district court of Pierce county to recover the possession of one brown mare, about eight years old, of the value of \$125, of which he alleged in the petition filed he was the owner and entitled to the immediate possession, and also alleged the unlawful and wrongful detention of the property by the defendants. The answer of the defendants was a general denial, except as to the value of the animal, which was admitted to be \$125, the value pleaded in the petition. During a term of the district court in Pierce county, and on March 22, 1892, a jury was impaneled for a trial of the issues and the plaintiff introduced his testimony, at the close of which the defendants moved the court to direct the jury to return a verdict in their favor, which motion was sustained and the court so directed or instructed the jury, in accordance with which instruction a verdict was returned for defendants. A motion for a new trial was filed on behalf of plaintiff, and on hearing was overruled and judgment rendered for the defendants. The plaintiff has removed the case to this court for review.

It appears that one F. C. Eldred, who was probably the former owner of the animal in controversy, executed and delivered to the Norfolk National Bank a chattel mortgage, in which it was claimed the animal in suit was included, and also made and delivered to the Farmers & Merchants Bank of Norfolk, Nebraska, a chattel mortgage, in which it was claimed this animal was also included, sub-

ject to the prior mortgage to the Norfolk National Bank; that the banks took possession of this and other property covered by the mortgages and subsequently sold it, the mare in dispute, to the plaintiff. During the trial the mortgage given by Eldred to the Norfolk National Bank, or a certified copy of it, was offered in evidence by the plaintiff and an objection was interposed for defendants that it was "incompetent, irrelevant, immaterial, and no proper and sufficient foundation has been laid; that the description of the property in the mortgage was too indefinite." The objection was sustained and the instrument offered excluded, to which ruling the plaintiff excepted, and one assignment of error refers to this action of the court. A similar objection was made to the offer to introduce the mortgage by Eldred to the Farmers & Merchants Bank, with a like result. Counsel for plaintiff state in their brief that the action of the court in excluding the mortgages was based upon their invalidity by reason of the indefiniteness of the description of the property contained in them. It is then assigned as error: "The court erred in excluding the written agreement of F. C. Eldred on the 9th day of March, 1887, on the back of said chattel mortgage. Said agreement being marked 'Exhibit C.'" The agreement referred to was as follows: "For value received I hereby relinquish all right and claim in and to any and all the within described property, and hereby authorize the owner of the mortgage, and the owner of the second mortgage given to Farmers & Merchants Bank of Norfolk, Nebraska, on same property, to sell and convey absolute title to said property at private or public sale, as may to them or either of them seem best, without notice, by publication or otherwise, and that said property may be sold at Plainview, Nebraska, or in the town of Pierce, Nebraska. Signed March 9, 1887." And a further allegation of error is: "The court erred in excluding the chattel mortgage executed and delivered to the Farmers & Merchants Bank

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by F. C. Eldred on the —— day of January, 1887, which is marked 'Exhibit B.' The property in controversy being described in said mortgage." And further that: "The court erred in excluding the parol evidence offered on the part of the plaintiff to show that the property in controversy in this cause was a part of the identical property described in the mortgage marked 'Exhibit B,' and for the further identification of said property." And also: "That the court erred in excluding the evidence of witness N. A. Rainbolt on plaintiff's part to show that the property in controversy was by F. C. Eldred on the 9th day of March, 1887, and in the forenoon of said day, sold and delivered to him and turned out to him as agent for the mortgagors, which was a *bona fide* pre-existing debt due from said Eldred to said banks."

It is contended by counsel for defendants that this being an action of replevin, the defendants' plea of general denial threw upon the plaintiff the burden of proving his right to immediate possession of the animal in controversy, and also the unlawful and wrongful detention of it by the defendants, and that he failed to do so, and that the actions of the court in excluding the evidence indicated in the assignments of error as hereinbefore quoted, if erroneous, which they claim they were not, could not and did not prejudice the rights of plaintiff. The only testimony adduced to show ownership and right to property in the plaintiff was contained in the evidence of George L. Iles, a portion of which was in relation to a sale made by him of the property taken under the mortgages of the banks, and of the mare in dispute, to the plaintiff. He stated as follows:

Q. Mr. Iles, you may state—do you know the horse in controversy in this suit—did you ever see it?

A. Yes, sir.

Q. And you may state when and where and under what circumstances you first saw the animal.

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A. The total amount of property taken under both mortgages was turned over to Owen Carrabine. Owen Carrabine remained at Plainview some days, protected the sheep by shed and made arrangements for the care of the horses, and piled up the machinery and got all the property in shape, and then came to Norfolk, and with both mortgages in my possession I went to Plainview shortly after they were taken, and at a private sale and at auction, I sold off the property.

Q. To whom did you sell the horse in controversy in this case?

A. To a young man by the name of Phillips.

Q. Do you know what became of the horse then?

A. I turned it over to him.

Q. Do you know whether he sold the horse to Peterson, the plaintiff in this suit?

A. I may be mistaken in the name. I sold to a young man.

Q. You sold to the plaintiff in this case?

A. Yes, sir.

Q. What did he pay for it?

A. To the best of my recollection he gave \$105.

Q. And you delivered to him the horse?

A. Yes, sir.

* * * * *

Q. You state that the animal in controversy in this case, which was sold to Peterson, the plaintiff, was taken possession of by him?

A. By who?

Q. By Peterson, the plaintiff in this case.

A. After I sold it; yes, sir.

This evidence tended to prove that at a date subsequent to the 9th of March, 1887, and very near in point of time to that date, the mare in dispute was sold and delivered to the plaintiff, but, did not establish that on the date of the 24th of May, 1887, the plaintiff was either the owner of

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the property or entitled to its possession, or its wrongful detention by the defendants. Under the issues as joined by the pleadings, the petition, and the general denial of the answer it devolved upon the plaintiff to show, first, that he was the owner of the property replevied; second, that he was entitled to immediate possession of it; and third, that it was wrongfully detained by the defendants. (*Moore v. Kepner*, 7 Neb., 291; *Blue Valley Bank v. Bane*, 20 Neb., 294; *Gillespie v. Brown*, 16 Neb., 458; *Wilson v. Fuller*, 9 Kan., 176.) The facts necessary to be established must be shown to have existed at the date when the action was instituted. The evidence introduced on behalf of plaintiff was insufficient to prove the facts which it was necessary for him to establish, as hereinbefore outlined, in order to entitle him to recover in the action, and the evidence which was excluded would not have aided him or made the proof any stronger in the portions where it was defective or lacking, as it was wholly directed to showing that the parties of whom the plaintiff purchased the mare had the right to make the sale, and it was not error to exclude it at the time during the trial when the offer to introduce it was made. It was not then competent or material. We can imagine a condition of the case which might have arisen had the defendants produced evidence by which an attack was made upon plaintiff's title as derived by the purchase of the property by a showing that there was no right or title in the party from whom he purchased, then the testimony which was offered might have been quite pertinent and proper to be admitted, but no such attack was made. The plaintiff having failed in his proof, it was not error for the trial court to direct the jury as it did, to return a verdict for defendants. The judgment of the district court is

AFFIRMED.

FRED STEINKRAUS ET AL., APPELLANTS, V. RICHARD
KORTH ET AL., APPELLEES.

FILED APRIL 16, 1895. No. 5915.

44	777
50	697
52	420
53	100
54	516
54	778
44	777
56	809
44	777
161	470

1. **Fraudulent Conveyances: TRANSACTIONS BETWEEN RELATIVES: EVIDENCE.** Where property is conveyed from one relative to another as a payment of an alleged past due indebtedness, and thereby creditors of the party making the conveyance are deprived of their just dues and claims, the transaction will be scrutinized or examined very closely, and its *bona fides* must be clearly established. *Plummer v. Rummel*, 26 Neb., 147, followed.
2. **Review: CONFLICTING EVIDENCE.** The finding of a trial court based upon conflicting evidence will not be disturbed on appeal to this court unless clearly wrong.
3. **Fraudulent Conveyances: EVIDENCE.** The evidence in this case examined, and *held* sufficient to sustain the findings of the district court.

APPEAL from the district court of Pierce county. Heard below before Allen, J.

Barnes & Tyler for appellants.

W. W. Quirey and *Powers & Hays*, contra.

HARRISON, J.

March 21, 1890, the appellees instituted this action in the district court of Pierce county. There was alleged in the petition then filed the recovery of judgments in favor, respectively, of Richard Korth, Henry Holly, D. R. Alexander & Co., George A. Brooks, the Fidelity Oil Company, Farrell & Co., Jacob Meyer & Co., Tolerton-Stetson Co., C. A. Morrell & Co., King Bros., E. P. Pickenbrock, and Herman Bros. against one F. Steinkraus, and the issuance of execution on each of them and the return thereof in-

dorsed no property found. There was also pleaded the transfer of certain property, including some real estate, from the judgment debtor to Herman Steinkraus of appellants, the transfer of the real estate being by warranty deed and, it was further stated, without consideration and with the intent to hinder, delay, and defraud these and other creditors, and with the knowledge on the part of the grantee of Herman Steinkraus of such fraudulent intent and purpose of the grantor. There was a further allegation of a transfer by assignment of a contract of purchase of certain other real estate by F. Steinkraus to the Farmers State Bank of Plainview with fraudulent intent, but it seems that this branch of the case was, during the progress of the action, abandoned, and we need give it no further notice. The relief sought as against the appellants F. and Herman Steinkraus was the setting aside of the conveyance from the former to the latter and to subject the real estate described in the deed, or the proceeds derived from the sale thereof, to the payment of the judgment set forth in the petition. The appellants F. and Herman Steinkraus filed separate answers, in each of which it was admitted that at the time stated in the petition F. Steinkraus was the owner of the real estate described therein, and that he conveyed the same by deed of general warranty to Herman Steinkraus and each and every allegation of the portion of the petition in which the fraudulent character of such transfer was pleaded was denied. A trial of the issues resulted in a decree in favor of the judgment creditors of the amount due to each, and vacating and annulling the conveyance of the real estate from F. to Herman Steinkraus, and ordering the property sold, from which the last mentioned parties have appealed to this court.

The sole contention of appellants is that the evidence was insufficient to sustain the finding that the charge of fraud was proved, or to sustain a decree based upon such finding. The testimony in the case discloses that F. Steinkraus and

Herman were father and son, and that the father, being engaged in business at Plainview, Pierce county, this state, and heavily indebted, on or about the 20th day of December, 1889, conveyed all of his property to the son, including the real estate in controversy in this action. It further appears that prior to and during the year 1876, F. Steinkraus was engaged in business in Norfolk, Nebraska, and that his son Herman, who was living with his father and assisting him in conducting the business, at some time during the year 1876, reached the age of manhood, and at the request of the father remained with him in the store, assisting him as before and making his home with the father. There does not appear to have been any definite arrangement or agreement with reference to what the son was to receive for his services except his board and clothing, which he did receive, and it is also shown that he probably also received at times during the continuance of this arrangement a little money. After the lapse of about three and one-fourth years the son left home and soon afterwards, or during the year 1881, removed to and resided upon some land in Pierce county. May 25, 1881, some business property in Norfolk, owned by the father, was conveyed to the son, the consideration stated in the conveyance being \$1,200. This, it is claimed by appellants, was the amount due the son for services he had performed in the store during the three and one-fourth years after he was twenty-one years of age, and that the father, not having money to pay the amount, and the son asking for a settlement, it was agreed that this property should be conveyed to him in payment of the claim. The father remained in possession and occupancy of the premises subsequent to the transfer, and the son received no rents or benefit of them. The father paid for repairs and insurance and also paid the taxes. The appellants testify that he made these payments as a consideration for his use of the property. In 1883, or about two years after the Norfolk property was conveyed

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to Herman Steinkraus, it was sold to O. Hirsch for the sum of \$5,000, the negotiation which resulted in this disposal being conducted by the father, the son being consulted once or twice in regard to it. Two thousand five hundred dollars of the five thousand dollars was paid, and to secure the balance Hirsch gave a mortgage on the premises purchased by him. The \$2,500, of the amount paid, was received by the father and retained by him, the son getting none of it. The appellants testify that it was loaned by the son to the father. Default was made by the purchaser in the payment of the amount secured by the mortgage and the mortgage was foreclosed, and at the sale of the premises in the foreclosure proceedings the son purchased them, but the evidence does not disclose whether he paid any other or further consideration for it than the amount due upon the mortgage which he was foreclosing. This was in 1887. Very soon afterward, and during the same year, the property was again sold, the amount realized being \$4,000. The father in this as in the prior sale appears as the party actively engaged in the transaction of sale of the property and received and retained the money, \$4,000, paid, it being claimed by appellants that it was loaned to him by the son. The fact of the father being the one who apparently effected these sales of this property is explained by the appellants in their testimony, in the statement that the son was on his farm at some considerable distance from Norfolk, and the father being in the first instance in possession of the property and managing it, and in the second instance in business in Plainview, where he was more likely to meet probable purchasers, attended to the sales as agent for the son. The \$2,500 derived from the first sale of the Norfolk property, subsequent to its transfer to the son, and the \$4,000 from the second sale, aggregating \$6,500, and the interest, although it is nowhere stated from when to when the interest was calculated or at what rate, form the consideration, \$7,050, as stated in it, for the conveyance

made from the father to the son during the month of December, 1890, and which was declared void by the decree in this case. We will now revert to the original transfer of the Norfolk property to the son. There is testimony in the record which tends to show that at the time of this transaction the father was having or expecting a controversy, and probably a lawsuit, with some party in Chicago, and several witnesses testify to conversations with the father or son when both were present, in which it was stated that the original transfer of the Norfolk property was made to the son because of the difficulty with the man who lived in Chicago, and the title was to be allowed to remain in the son's name until it was settled. This evidence is denied by the appellants. It further appears that during the year 1884 the son concluded to engage in the lumber business in the town of Plainview and it was necessary that he should have about \$2,500 in money to put into the enterprise. This amount was, as appellants testify, furnished and loaned to him by the father, and repaid a few months subsequent to the time loaned. It will be remembered that at the time this transaction of loan, etc., occurred between the father and son the father was indebted to the son for money derived from the sale of the Norfolk property and stated to have been used by the father as a loan from the son. In December, 1890, when the conveyance was executed, which was set aside by the court in the present action, the father was indebted to various creditors, the sum of such indebtedness being in the aggregate about \$7,000, and was unable to pay, and it may be fairly inferred from the testimony that the son had knowledge of these facts in relation to the father's financial circumstances.

The foregoing statement, we think, may be said to be a summary of the majority of the salient facts or points developed in the testimony adduced during the trial of the cause in the district court. There were some other and further facts shown which tended to support the position

of one or the other of the parties litigant, but, as we view them, they were of minor importance, although corroborative of the other and prominent facts, and we do not deem it necessary to quote them. We have carefully read, examined, and considered all the testimony and record, and it presents one of a class of cases where there is a conveyance of property from one relative to another, in this case from father to son, the party making the transfer being involved financially or in debt beyond his ability to pay, and the apparent consideration for the transfer an indebtedness for service rendered or a loan made at some time in the more or less distant past, as the case may be, and of which there is generally, as in the case at bar, no other evidence than such verbal proof as may be obtainable of the facts and circumstances of the transactions which have occurred between the parties, and from these, combined with the facts and circumstances attendant upon the transfer, which is the subject of attack, its character, whether fraudulent or otherwise, must be established and determined. In this case it was clear that if the transaction of December, 1890, between the father and son was valid, its effect must necessarily be to hinder and delay the appellees in the collection of the debts due them from the father, and in fact to deprive them of their just dues. The rule in this state as to such transactions has been established as follows: Where property is conveyed from one relative to another as a payment of an alleged past due indebtedness, and thereby creditors of the party making the conveyance are deprived of their just dues and claims, the transaction will be scrutinized or examined very closely, and its *bona fides* must be clearly established. (*Fisher v. Herron*, 22 Neb., 185; *Bartlett v. Cheesbrough*, 23 Neb., 771; *Plummer v. Rummel*, 26 Neb., 147; *White v. Woodruff*, 25 Neb., 803.) Applying the directions of the foregoing rule to the facts developed in the trial of the case at bar, and searching closely into all the circumstances of the transfer from the father to the son

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and its consideration and its source, and all the facts and circumstances shown by the testimony in any manner affecting it and tending to establish its good faith or lack of it, we reach the conclusion that there was sufficient evidence to sustain the finding of the court that it was fraudulent and invalid, and to warrant the court in annulling it. It is true that the testimony on many points was conflicting, but as we have determined that there was sufficient evidence to support the finding, the case is within the rule of this court that where the finding of the trial court is founded upon conflicting testimony, it will not be disturbed unless clearly wrong. The decree of the district court is

AFFIRMED.

C. A. KISSINGER v. M. V. STALEY.

44 783
47 689

FILED APRIL 16, 1895. No. 6334.

1. **Review of Rulings on Evidence.** In order to render the error, if any, in the admission of testimony by a trial court available, where the evidence was given before any objection was made to its introduction, it must appear that a motion was made to strike such evidence from the record, a ruling of the trial court obtained thereon and exception taken thereto.
2. **Taxation of Costs.** "In all actions, motions, and proceedings in the supreme, district, or justice's courts the costs of the parties shall be taxed and entered on the record separately." (Sec. 30, ch. 28, Compiled Statutes, 1893.)
3. ———: **JUSTICE OF THE PEACE.** A judgment of a justice of the peace was as follows: "It is therefore considered by me that the plaintiff recover from the defendant the sum of \$7.48 and his costs herein expended, taxed at \$37.55, as follows: See margin." *Held*, To be correct in form in its reference to costs, as it only allowed the recovery by plaintiff of his costs expended in the suit; and further, that separately stating or entering the costs in itemized tables on the margin of the record was a suffi-

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cient compliance with the requirements of the law in regard to separate taxing and entering the costs on the record.

4. —: **PRESUMPTION OF REGULARITY.** Where from statements in the record it appears certain items of the costs as taxed are proper charges, in the absence of any showing to the contrary they will be presumed to be correct.

5. **Justice of the Peace: TRIAL: FEES OF CONSTABLE.** No fee is allowable by law to a sheriff or constable for attendance during the trial of a civil case before a justice of the peace.

ERROR from the district court of Pierce county. Tried below before JACKSON, J.

H. F. Barnhart, for plaintiff in error.

C. B. Willey, *contra*.

HARRISON, J.

January 18, 1893, the defendant in error commenced an action before a justice of the peace in Pierce county, against the plaintiff in error, claiming in his bill of particulars the sum of \$42.50, and praying judgment therefor. After summons served, etc., the plaintiff in error appeared and on his application a continuance of the cause was granted for thirty days, at the expiration of which time plaintiff in error filed an answer, or, as stated in the entries on the docket made by the justice, "parties appeared and defendant filed counter-claim asking for judgment of \$11.36." Plaintiff in error demanded a jury, which was called, and as a result of a trial of the issues, the defendant in error recovered a verdict, upon which judgment was rendered in his favor. Plaintiff in error presented a motion to retax the costs, which was overruled, and to correct the alleged error in the ruling on the motion, and other errors claimed to have been committed by the justice during trial, the case was removed to the district court of Pierce county, where, on hearing, the rulings and judgment of the justice of the peace were affirmed and the case has been brought

to this court to obtain a review of the decision of the district court and rulings of the justice of the peace. In the bill of exceptions, in which were preserved portions of the proceedings during the trial before the justice, appears the following:

“Be it remembered that on the trial of this cause by a jury before me, J. B. Short, a justice of the peace in and for Pierce precinct, Pierce county, Nebraska, at my office therein, on the 23d day of February, 1893, the plaintiff, to maintain the issues on his part, called as a witness Charles E. Staley, who being sworn as required by law testifies as follows: ‘That at some time before he [witness] and Attorney Moyer were to see Kissinger at Osmund, Nebraska, and prior to bringing this action, that in a conversation between them and Kissinger at the time, he, Kissinger, said that he had offered prior to that time to pay Staley, the plaintiff, some six or eight dollars in settlement of his claim.’ To which testimony the defendant objected, for the reason that the same was incompetent, irrelevant, and immaterial, and for the further reason that if said offer was made at all it was made for the purpose of avoiding a lawsuit, which objection was overruled by the court; to which ruling of the court the defendant then and there duly excepted.”

It is argued that the evidence which was admitted by the justice, as stated in the foregoing quotation from the bill of exceptions, contained an offer of compromise and settlement and should have been excluded. It will be noticed that, so far as the record discloses, this evidence was given in a narrative form and not in answer to any question which preceded it. If there was a question asked the witness to which this testimony was responsive, such fact is not shown by the record. Nor did the plaintiff in error, so far as is disclosed by the record before us, move to have the testimony, the reception of which it is claimed was objectionable and prejudicial to his interests, stricken

out. If the testimony, of the admission of which complaint is made, was erroneous, it cannot avail the plaintiff in error, for the reason that the record is not in such condition as to raise or present the question of the correctness of its admission. If it was given in response to an interrogatory, there should have been a proper objection to the interrogatory and a ruling obtained thereon, and, if adverse, an exception taken. If the evidence claimed to be objectionable was recited in a narrative form or volunteered by the witness, or if given in answer to a question and being as an answer in its entirety, or as a portion of it, not responsive to such question, there should have been a motion to strike it out and, if overruled, an exception taken. (*Palmer v. Witcherly*, 15 Neb., 101; 1 Thompson, Trials, secs. 716, 718; *Clanin v. Fagan*, 24 N. E. Rep. [Ind.], 1044; *Hangen v. Hachemeister*, 5 L. R. A. [N. Y.], 137.)

It is urged that the justice erred in the portion of the judgment rendered which referred particularly to the costs, in that they were not taxed separately. The judgment in the case was in words and figures as follows: "It is therefore considered by me that the plaintiff recover from the defendant the sum of \$7.48 and his costs herein expended, taxed at \$37.55, as follows: See margin." And on the margin the costs were itemized and tabulated, such as were made by the parties respectively being stated separately under the appropriate heading. The judgment in form was correct, as it only allowed the recovery by the plaintiff from defendant of his costs expended in the suit. (*Cooper v. Hall*, 22 Neb., 171.) Section 30 of chapter 28, Compiled Statutes, 1893, (Consolidated Statutes, sec. 3030,) is as follows: "In all actions, motions, and proceedings in the supreme, district, or justice's courts the costs of the parties shall be taxed and entered on the record separately." Inasmuch as the costs in this action were arranged in separate itemized tables and designated in such a manner as to show which were made by either party to the suit, we are

satisfied that the requirements of the section of the statutes on that subject were sufficiently fulfilled, and the fact that in the judgment there appeared a statement of the entire costs was not such error, if erroneous, as to call for a reversal of the ruling on the motion to retax the costs.

It is claimed that the sheriff charged twenty-five cents for serving each subpoena and a like amount for each copy, and his returns to the writ show that there was personal service, and that it is only when personal service of a subpoena issued from justice court cannot be made that the use of a copy becomes necessary. Sections 962 and 963 of the Code of Civil Procedure are as follows :

“Sec. 962. Any justice may issue subpoenas to compel the attendance of witnesses to give evidence on any trial pending before himself or for the purpose of taking depositions, or to perpetuate testimony.

“Sec. 963. A subpoena may be served by a constable or any other person, and shall be served by reading the same or stating the contents thereof to the witness, or by leaving a copy thereof at his usual place of residence.”

There is nothing in the record presented here, however, from which we can determine whether the service of the subpoenas was personal or not. All that we have is the statement made in the list of the costs, and from them it appears that a charge has been made for service and for copies, and in the absence of anything to the contrary in the record we must presume that these statements were taken from the returns and were correct, and if so there was no error in so entering them, or overruling the motion to retax them.

It is further stated that the officer charged \$1.85 for serving the venire for the jury ; that this was not the correct amount which should have been charged, according to facts stated in the returns of such service. The return is not in the record in this court, and we have and are furnished with no other means of arriving at a conclusion as

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to the correctness of the charges made by the sheriff and must be governed by the record and cannot presume it to be erroneous.

It is further alleged that the justice charged fifteen cents for filing a motion, and that the charge should have been but ten cents. By the only entry we can discover where a charge is made for filing a motion, the charge stated is ten cents; hence this objection must be held to have no force.

It is also stated that there appears a charge by the justice for a "record," for which there is no warrant in law. We have been unable to discover any provision for any such fee or charge by the justice of the peace and are satisfied that this portion of the costs was incorrect and should not have been taxed. The officer (in this case the sheriff) was allowed the sum of \$2 for two days' attendance before the justice, presumably for one day on the date the application for continuance was made and granted and for one day when the trial occurred. Counsel for plaintiff in error contends that there is no provision in our law for the allowance of any fee to the officer for his attendance at a trial in a civil case before a justice of the peace. Section 976 of the Code of Civil Procedure, which applies to justice court, states that he shall attend. It reads as follows: "The constable or sheriff shall be in attendance on the court at and during the progress of the trial," etc. In regard to the compensation to be received by the officer for such service, the law-makers have not apparently at all times been of the same opinion. In section 5 of the fee bill as it existed in 1886 (see Rev. Stats., p. 163, ch. 19, sec. 5.) the sheriff was allowed \$1.50 for opening court and attending thereon. This referred, presumably, to the district court, as we find the further statement in section 6: "The sheriffs of the several counties of this territory, for performing the duties required by law to be performed by them in the probate or justice court, shall receive the same fees as are allowed for similar service in the district court, to be taxed against

the proper party or parties by the probate judge or justice." In 1871 section 5 was amended, but not in the particular portion now under consideration. (See Session Laws, 1871, p. 108.) In 1875 (see Session Laws, 1875, p. 80) section 5 of the fee bill was amended; although the act purported to amend section 5 of chapter 22, chapter 19 was evidently intended (see *Lancaster County v. Hoagland*, 8 Neb., 38); and it is further enacted, "Opening and attending on probate and justice's court, one dollar and fifty cents, to be taxed as other costs in such courts." (Session Laws, 1875, p. 82, sec. 1.) In 1877 (see Session Laws, 1877, p. 40) sections 5 and 6 of chapter 19 of the Revised Statutes of 1866 were amended, and section 5, as amended, contained no statement in regard to fees of the sheriff in either county or justice's courts, and section 6 was amended to read as follows: "For performing the duties required by law to be performed by them in the county court, sheriffs shall receive the same fees as are allowed for similar services in the district court, except for attendance on the county court, to be taxed against the proper party or parties by the county judge." Neither, as will be noticed, containing anything in relation to a fee for attendance of the officer in a justice's court, the provision for such fee being entirely omitted from the last amendatory act. This act of 1877 also repealed the act to amend section 5 of chapter 22, approved February 25, 1875, to which reference was heretofore made, and also repealed all acts and parts of acts inconsistent with its provisions. From this it seems that there is no law in force which allows the sheriff any fee for attendance during the trial of a civil action in a justice's court, and the taxation of the sum of \$2 as a part of the costs in the case at bar for such attendance was erroneous. This completes the consideration of all the points argued by counsel for plaintiff in error in the brief filed in this court, and it follows from the conclusions reached that the ruling of the district court affirming the judgment of the justice of the peace upon the merits of

Marquett, Deweese & Hall, for plaintiff in error:

A party to a contract who has facilities and opportunities for examining and ascertaining the true state of affairs, has no right to rely upon the representations of the other party. (*Parker v. Moulton*, 114 Mass., 99; *Mooney v. Miller*, 102 Mass., 217; *Poland v. Brownell*, 131 Mass., 138.)

To avoid a contract on the ground of false representations it must be shown that the representations were relied upon, and that damage resulted. (*Stout v. Merrill*, 35 Ia., 47; *Stafford v. Maus*, 38 Ia., 133; 1 Story, Equity Jurisprudence, secs. 195, 197; *Phillips v. Duke of Bucks*, 1 Vern. [Eng.], 227; *Dawson v. Graham*, 48 Ia., 378; *Gee v. Moss*, 68 Ia., 318; *Abbott v. Abbott*, 18 Neb., 505.)

Cornish & Lamb, contra, cited: *Converse v. Meyer*, 14 Neb., 192; *Porter v. Fletcher*, 25 Minn., 493; *Olson v. Orton*, 28 Minn., 36; *Nolte v. Reichelm*, 96 Ill., 425; *Morgan v. Dinges*, 23 Neb., 271; *Thomas v. Beebe*, 25 N. Y., 244.

HARRISON, J.

The defendant in error (hereinafter referred to as plaintiff) commenced an action in the district court of Lancaster county to recover of the plaintiff in error (hereinafter designated as defendant) the sum of \$5,500 and some interest thereon, stating in his petition two causes of action, as follows:

“The plaintiff for cause of action states that on the ——— day of February, 1887, the plaintiff was the owner and in the possession of the following described property, to-wit: Twenty head of calves, ten head of milch cows, one yearling bull, one span of mules, four mares, from seven to ten years old, twenty head hogs, two lumber wagons, three sets double harness, one self-rake reaper, two riding plows, one harrow, four hundred bushels oats, fifty bushels wheat, one

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cook stove, one cupboard, one flour chest, one horse rake, one mowing machine, in the value of twenty-five hundred (\$2500) dollars; that on the said date the defendants, without the consent of this plaintiff, unlawfully converted said property to their own use, to the damage of this plaintiff in the sum of twenty-five hundred (\$2500) dollars.

“For the second cause of action plaintiff alleges that on or about the first day of December, 1886, the plaintiff was the owner and in the possession of the following described property, to-wit: The east one-half ($\frac{1}{2}$) of section twenty-five (25), township twelve (12) north, range four (4) east, Seward county, state of Nebraska; that on and subsequent to that date and up to and including the — day of February, 1887, the plaintiff resided in Lake county, Dakota, a long distance removed from said land; that on or about the 1st day of December, 1886, the plaintiff employed the defendant A. W. McCready to go to Seward, Seward county, state of Nebraska, to investigate the incumbrance upon said land and report to plaintiff the result of said investigation; that the said A. W. McCready, in pursuance with said employment, went to Seward county, state of Nebraska, for the purpose of making said investigation, and thereafter returned to Lake county, Dakota, and falsely and fraudulently represented to this plaintiff that a judgment was rendered against plaintiff, to-wit, in the sum of eight hundred (\$800) dollars, and that the same was a lien upon said land, and that the holders of the mortgages of twenty-three hundred (\$2300) dollars had commenced foreclosure proceedings against said land, and thereafter, to-wit, on the — day of February, 1887, the said defendants A. W. McCready and Sarah A. McCready renewed said representations to this plaintiff and stated to this plaintiff unless he sold said land that the same would be taken under the foreclosure proceedings, and that the plaintiff would realize nothing from the sale of said real estate, and thereupon the said defendants A. W. McCready and Sarah Mc-

Cready urged this plaintiff to dispose of said real estate to said defendants, and by reasons of said false representations and relying upon the same this plaintiff was induced to part with said real estate and dispose of the same to the defendant Sarah A. McCready; that said representations were false in every particular, and in truth and in fact no foreclosure proceedings had been commenced upon said mortgages, and said judgment would in truth and in fact not exceed the sum of five hundred (\$500) dollars, and no measures had been taken to enforce said judgment against said real estate, and that said real estate was reasonably worth, up to said date, the sum of sixty-five hundred (\$6500) dollars, and the said defendants, by means of said representations, induced the plaintiff to sell the same to defendant Sarah A. McCready for about the sum of thirty-five hundred (\$3500) dollars, whereby the plaintiff was damaged in the sum of three thousand (\$3,000) dollars; that the said Sarah A. McCready and A. W. McCready were and are wife and husband.

“By reasons of the causes of actions heretofore set forth, plaintiff asks judgment in his favor and against defendants for the sum of fifty-five hundred (\$5500) dollars and interest thereon at the rate of seven (7) per cent per annum from the — day of February, 1887, and costs of this action.”

It appears that no service was obtained upon Sarah A. McCready. A. W. McCready filed the following answer:

“Now comes A. W. McCready, one of the defendants herein, and for his separate answer admits that the plaintiff was at one time the owner and in possession of the personal property described in plaintiff's petition, and further alleges that on the 25th day of February, 1887, said Thomas L. Phillips and his wife, Sarah Phillips, gave to this defendant a power of attorney in writing, by which this defendant was authorized, instructed, and empowered to sell and dispose of all the personal property described in plaintiff's first cause of action for and on behalf of said plaintiff,

in which said power of attorney this defendant was authorized and empowered to do the best he could in connection with the sale and disposition of said property, and said plaintiff agreed that he would find no fault whatever nor make any objections to anything that defendant might do in connection with said property and that the plaintiff would consider that said defendant had done the very best that could be done in connection with the sale and disposition of said property.

"This defendant further says that he sold said property under and by virtue of said power of attorney for the best possible price that he could obtain and on the most favorable terms for the sum of \$1,190.

"Defendant further answering says that the proceeds arising from said sale were to be applied as far as they would go to the payment of three promissory notes of \$500 each, and on the \$602 note, all of which were executed and delivered by the said Thomas L. Phillips to this defendant and the proceeds arising from said sale were thus applied, leaving a balance still due and owing from the plaintiff to this defendant of \$912, together with interest thereon, no part of which has been paid, but all of which is long past due.

"Defendant, in answer to the second cause of action in plaintiff's petition, says that he admits that plaintiff was the owner of the east half of section 25, township 12 north, of range 4 east, Seward county, Nebraska, and that he sold the same to said defendant, and that she paid to the plaintiff the purchase price of said land in full, and that all questions of every kind touching the sale and deeding of said property was had between said defendant and the plaintiff on the 23d day of December, 1886, and on said date defendant paid to the plaintiff as the balance of the purchase price of said real estate, and it was agreed that said defendant should assume six mortgages on said real estate of \$2,700, together with the taxes of \$111; also the interest on said mortgages from September 1, 1885.

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“Defendant further answering denies each and every other allegation in said petition contained not hereinbefore specifically admitted.

“Defendant for the purpose of obtaining affirmative relief files his counter-claim or cross-bill and says that on the 23d day of December, 1886, that being the time on which the plaintiff and the defendant had a full and final settlement, the said plaintiff and his wife, Sarah Phillips, executed and delivered to Mrs. Sarah A. McCready their three promissory notes of \$500 each, payable as follows, to-wit: The first one on the 1st day of October, 1887, with interest at the rate of ten per cent per annum from date; the second one, for \$500, on the 1st day of October, 1888, with interest at the rate of ten per cent per annum from date; and the third one, of \$500, on the 1st day of October, 1889, with interest at the rate of ten per cent per annum from date; that on the 25th day of February, 1887, the said Thomas L. Phillips executed and delivered to Sarah A. McCready, defendant herein, his promissory note in writing for \$602, which was due and payable on the 1st day of January, 1888, with interest at the rate of ten per cent per annum from date; that this defendant is now the owner and holder of the three \$500 notes given by said plaintiff and his wife to the said Sarah A. McCready, having purchased the same in due course of business before maturity; that all of said notes are long past due and the plaintiff has not paid the same, or any part thereof, except the sum of \$1,190; that there is still due and owing to this defendant from said plaintiffs upon said promissory notes the sum of \$912, together with interest from date at the rate of ten per cent per annum, for which amount this defendant prays judgment against said plaintiff.

“Wherefore this defendant prays that plaintiff’s petition may be dismissed and that this defendant may recover a judgment against the plaintiff for \$912 and interest and costs.”

To which reply was made as follows:

"For reply to defendant's answer herein plaintiff denies the allegations therein contained, or if plaintiff did sign the power of attorney described in said answer, his signature was procured through the fraud and the false representations of said defendant. Plaintiff believes that he did not sign said instrument, and denies as aforesaid the other allegations in said answer contained."

There was a trial of the issues before the court and a jury, which resulted in a verdict and judgment in favor of the defendant in this court in the sum of \$2,801.05, and to secure a review of the proceedings during the trial in the district court the defendant has brought the case to this court.

One assignment of error urged by counsel for defendant is: "The court erred in refusing to grant to the plaintiff herein a new trial for newly discovered evidence material to the plaintiff, as shown by the affidavits of C. L. Graves, Ed. Graves, and others submitted herewith, which evidence the plaintiff herein was unable after reasonable diligence to discover and produce on the trial." It will be noticed that this assignment refers to certain affidavits as submitted in support of the application for new trial on the ground of newly discovered evidence, and counsel in their brief quote from the statements contained in the affidavits, but we have been unable to discover these papers in any portion of the record filed in this court and must conclude that they were not made a part of it by being incorporated in the bill of exceptions, and not having the evidence before us which was considered by the district court in passing upon this portion of the motion, we cannot determine the correctness of its ruling thereon, and the presumption being in favor of its correctness, in the absence of anything tending to show to the contrary, it must be affirmed.

The first and second points which are argued in the brief

of counsel for defendant refer to alleged errors of the trial court in the instructions 1 and 7½, given to the jury, and may be considered together. The portion of the first instruction, which was a summarized statement of the cause of action set forth in the petition, of which the defendant complains is as follows: "That defendant McCready, having been employed by the plaintiff to examine into the condition of 320 acres of land in Seward county, Nebraska, falsely and fraudulently represented that a judgment for \$800 had been taken against the plaintiff and execution thereon levied upon said land;" and number 7½, which it appears was number 4 of instructions requested for defendant in error, but designated by the court in regular order of instructions given as 7½, read as follows: "If you find from the evidence that the defendant McCready falsely and fraudulently represented to the said plaintiff the mortgages upon said land in controversy were being foreclosed; that there was a judgment against the said plaintiff for \$800, which was a lien upon said land, and upon which judgment execution had been issued and levied upon the land and the same was about to be sold, and the said defendant made such representations falsely and fraudulently with the intention of inducing plaintiff to make a contract of sale for said described property, and the said plaintiff, reposing faith and confidence in the said defendant, relied upon such representations and did make the trade of said land, and in that event you are instructed that the defendant in making the representations as aforesaid is liable in this action for the fraud and deceit so practiced and would be liable to the plaintiff for any injury he may have received thereby." Counsel for defendant contend that it was error on the part of the court to inform the jury that there was any question of false representations on the part of the defendant in relation to an execution having been issued and levied upon the plaintiff's land, included in the issues presented in the case for their consideration, inas-

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much as no allegation of any such representation appeared in the petition, and for the same reason it was error and prejudicial to defendant's rights to instruct the jury on this same subject as the court did in instruction No. 7½, hereinbefore quoted, that as an element upon which a finding and verdict for plaintiff might be based, was the false statement of defendant that execution had been issued upon the judgment, levied on the land, and a sale of it about to be made, if shown by the evidence. It will be remembered, or a reference to the allegations of the petition herein quoted will disclose, that there is no statement in the pleadings of any representations by defendant in regard to an execution or any active measures instituted for the enforcement of the judgment; all that was claimed to have been said was that a judgment had been rendered in the sum of \$800, and that the same was a lien upon the land. Counsel for plaintiff say that the fact of an execution and levy must have been in the pleader's mind; it is stated by implication. It is doubtless true that it may have been and was in his mind, but counsel might have further said that, following the usual and ordinary course of procedure or practice, it should not have been allowed to remain stored in the mind, but should have been written in and made part of the allegations or statements of the causes of action in the petition if it was desired to present it for the consideration of the court and jury. It will scarcely suffice, we think, to rely upon implication to supply a statement of such a material portion of a pleading in an action as this would have been in the case at bar. Furthermore, it appears from the testimony that the plaintiff had full knowledge in relation to this judgment, except as to its exact amount, which was about \$500 instead of \$800, the amount alleged to have been represented by defendant. Inasmuch as it was not pleaded that the defendant had falsely represented that an execution had been issued to enforce the judgment and levied

upon the land, and the same was about to be sold, it was error for the court to instruct the jury that this constituted one of the issues of the trial; and further, that if the evidence disclosed that such representation had been made by defendant and its falsity, etc., it might be made a constituent of a basis for a finding in favor of plaintiff. But it is urged that notwithstanding it was an erroneous action of the court to thus charge the jury in reference to matters which were not of the issues of the action, yet, since the portion of the instruction which was objectionable was not alone the subject of the instructions, but was in each of them, No. 1 and No. 7½, combined with the further element of fraud and deceit, viz., an alleged false representation of defendant in regard to the foreclosure of the mortgages, and the two as a whole stated to be of the issues and for the examination and determination of the jury, if, eliminating the objectionable portion from the charge of the court there remained sufficient, if proved and believed by the jury, upon which to predicate a finding and verdict for the plaintiff as to this branch of the case, then the error in the charge was not prejudicial. It is a rule, which we believe is sustained by both precedent and reason, that in cases where fraud and deceit are the basis of a prayer for relief, the court will not measure with particularity to ascertain what portion of the alleged fraud and deceit has been established, or as to what effect it should have exercised upon the parties upon whom it was practiced, but the issue will be, was any portion of it used as alleged and for the purpose stated, and was it sufficient to effect the purpose? Did it in such a case as the one under consideration excite the complaining parties and cause such fear and apprehension in their minds of a loss of their property as to induce them to dispose of it to the party making the representations at a sacrifice, or far below its real value and on terms and conditions disadvantageous to them and to the advan-

tage of the other party? If so, relief will be granted. (See Bigelow, Fraud, 88, 89, and cases cited; Kerr, Fraud & Mistake, 75.)

A question which it seems proper to consider at this time is, did the representations, if proved to have been made by defendant and to have been false in relation to the foreclosure of the mortgages, so operate upon and influence the minds of plaintiff and his wife in causing them to fear the loss of the farm as to induce them to part with and convey it to defendant or some one designated by him, for such a reduced consideration as compared with its value as to constitute it a fraud upon their rights in the premises. To determine this we turn to the testimony of the plaintiff and his wife. He stated that the land was worth \$20 per acre, or the whole farm of 320 acres \$6,400, and a number of times he said he wanted \$6,000 for it, and in stating, during cross-examination, his understanding of the sale to defendant, testified as follows:

Q. Now is not this a fact, that when you purchased this \$3,000 worth of personal property from McCready, you gave him your notes for \$3,000 and you also gave him a deed to your farm, and you told him that the incumbrance on the farm was \$2,300, and he was to give you credit upon this \$3,000 that you owed him for the purchase price of the farm after deducting the \$2,300 incumbrance.

A. No, sir; that was not the transaction.

Q. How do you know?

A. There was nothing said about that.

Q. How did you happen to fix the consideration? What was the consideration you gave him in that deed at that time?

A. Six thousand dollars.

Q. How much was the consideration for the farm when you sold it to him the last time or second time?

A. He gave me so much for it.

Q. Well, how much? Four thousand five hundred dollars, was it not?

A. He gave me the stock and \$800, and assumed all the mortgages.

Q. He gave you the stock and \$800, and assumed all the mortgages?

A. Yes, sir; he took out the horses and some other things, I do not recollect; that was assigned to S. A. McCready, the same stock.

Q. That is, you turned back part of the stock?

A. Yes, sir; I did not have any use for it.

Q. You turned back stock, the difference between \$2,300 and \$3,000.

A. I cannot just tell how much I turned back.

Q. You are not very clear on that transaction, are you? Do you remember pretty distinctly the whole transaction?

A. Yes, sir; I do.

* * * * *

Q. How much were you to get for this farm when you made this final deed?

A. Two thousand four hundred dollars worth of cattle and stock and \$879 in money.

Q. That was the full consideration for the place, was it?

A. Yes, sir.

Q. That was your understanding of the transaction, was it?

A. Yes, sir.

And during the redirect examination:

Q. In the final sale of the place, the farm for \$2,400 worth of stock and \$879 in money, what was done with the incumbrance,—the mortgages and judgments upon the land?

Objected to; that this has all been gone over and it is not proper redirect examination. Overruled. Exception.

A. He assumed the \$2,300 and the judgments. He claimed the mortgages to be \$2,700.

Q. He assumed that and agreed to pay that?

A. Yes, sir.

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Q. And that made up a part of the consideration?

A. Yes, sir.

And again during recross-examination:

Q. Now tell the jury how much he was to give you for the land and the manner in which it was to be paid. Tell the jury how much you sold the farm for.

A. As I said before, I would not take less than \$6,000 for it.

Q. How much did Mr. McCready agree to pay you for it?

A. He was to give me \$2,400 worth of stock and \$800 in money and assume the indebtedness.

Q. How much was the indebtedness?

A. There was a \$500 judgment, \$507 is what the record shows, and there was \$2,300 in three mortgages, one of \$800, one of \$1,000 and one of \$500, and there was taxes of \$35, and he claimed there was another tax of about \$70 for the next year, the year following.

Q. So the agreement between you and Mr. McCready at that time was, that you were to have \$6,000 for the farm?

A. That is what I wanted for it.

Q. Was that the agreement?

A. I understood it so.

Q. Will you answer my question—was the agreement between you and Mr. McCready that you should have \$6,000 for your farm, that he was to give you \$2,400 in cattle, \$870 in money, and he was to pay off the incumbrance? Was that the agreement between you and Mr. McCready?

A. Yes, sir; that is the way I understood it.

Q. That is the way you understood it?

A. Yes, sir.

Mrs. Phillips, wife of plaintiff, testifies on this subject, during direct examination, as follows:

Q. What did Mr. McCready say about your farm?

A. Mr. Phillips did not do much talking. My husband never done much talking. Mr. McCready done the talking. We let him do the talking—what talking there was done. He explained how the place was to be sold under the mortgage on it. What there was upon the place was to be foreclosed; that we were back so much; that he was to give \$878 and we were to have the cattle and he was to assume the indebtedness against the place and we were to have the stock and \$878 difference in money.

Q. What stock do you mean?

A. We were to have the cattle and horses.

During cross-examination she states:

Q. Now you say at that time that this conversation you have been speaking about took place that you sold your farm for \$6,000.

A. Yes, sir.

Q. And that he was to pay \$2,400 in stock?

A. Yes, sir.

Q. And \$878 in money?

A. Yes, sir.

Q. And he was to assume the incumbrance upon the place?

A. Yes, sir; that is the way I understood it.

These statements of the plaintiff and his wife show that at the time he sold his land, the contract for it, as they understood it and made it, gave them for it as much as the plaintiff asked for it, and any representations made by defendant did not influence them, according to their own statements or version of the affair, to dispose of the land at a sacrifice. From any view of the plaintiff's case as presented by the petition and testimony, we must conclude that the instruction numbered 7½ was not applicable to the issues or evidence and should not have been given; and further, that there was no testimony to sustain a finding that the mind of plaintiff had been so operated upon by false representations of defendant as to induce him to sell his

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farm for a price far below its value, or even less than what he considered it worth, or wanted for it.

Another branch of plaintiff's action was the alleged conversion by defendant of personal property of the value of twenty-five hundred dollars. The evidence discloses that the plaintiff had been living in Dakota with the defendant, or on his farm, and a large portion of this personal property which it is stated the defendant converted consisted of the stock which was sold by defendant to plaintiff, or, as it will be remembered the plaintiff and his wife testified, became theirs as a part of the consideration for the sale of their farm to defendant. During the month of February, 1887, the plaintiff removed with his family from Dakota to Omaha, Nebraska, and it was agreed that defendant should care for this personal property, make a sale of it, and, the plaintiff says, send the proceeds to him at Omaha. Defendant claims that the proceeds were to be applied on some notes which he then held and which he further claims evidenced an indebtedness of the plaintiff to him arising out of the land and stock deal which are the subjects of the whole controversy in this action. The court, at the request of plaintiff, instructed the jury as follows on this part of the case:

"You are instructed that if you find from the evidence that the said plaintiff was the owner of the chattel property described in plaintiff's petition, having purchased the same from the defendant McCready, and that the said plaintiff left the said property in the possession and under the care and control of the said defendant with an understanding and agreement with the said defendant McCready that he should sell and dispose of the same and remit the proceeds thereof to this plaintiff; and if you further find from the evidence that the said McCready did dispose of and sell the said described property, but failed to comply with said agreement and understanding, and failed to remit the said proceeds to the plaintiff, but appropriated the same to

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his own use and failed to account therefor, then and in that event you are instructed that such appropriation of the proceeds from said sale would constitute a conversion and the plaintiff herein would be entitled to recover at your hands a verdict for the market value of said property at the time so converted."

This, it is contended by counsel for defendant, was erroneous, in so far as it stated that the measure of damages would be the market value of the property at the time converted.

In further charging the jury the court stated in instruction number 10, as follows:

"The plaintiff cannot be heard to complain at this time as to the prices received for said property, and as to the matter of caring for and disposing of the said property, provided the jury find that the defendant used ordinary care and prudence in caring for, selling, and disposing of said property, and would only be obliged to account to the plaintiff for the proceeds arising from said sale after paying the expenses of feeding and caring for said property."

This latter instruction, we think, was correct, and, in view of all the evidence relating to the subject involved, stated the true rule of damages or measure of recovery. The plaintiff was allowed to testify in regard to the value of this property (defendant objecting) as follows:

Q. You may state what was the value of the personal property that you purchased at that time from McCready.

Objected to, as incompetent and immaterial, and not the proper foundation laid, and not admissible under the issues.

Q. What was the value of that personal property?

Objected to, as incompetent and immaterial, and not the proper foundation laid. Overruled. Exception.

A. It was thoroughbred stock—young cattle. It was worth the money he represented it to be.

Q. What did he represent it to be worth?

A. Two thousand four hundred and seventy dollars is what he had upon the book.

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This surely could not be accepted as furnishing information from which the jury should assess the amount of recovery, if any, directed as it was to the time of the purchase of the property, and, under the guidance of the language used in instruction numbered 1, in reference to their branch of the case, the jury were liable to be misled in adopting this value as the amount to be recovered. The defendant stated, while testifying on this point, that he realized from the sale of the personal property, having sold part at auction and part at private sale, after paying expenses, etc., the sum of \$1,190. The verdict in the case was a general one in the sum of \$2,801, and not directed or confined to any particular branch of the case, nor any statement made by which we are able to say whether it was in whole or in part given as damages for the alleged fraud and deceit practiced in inducing the sale of the farm to defendant or in whole or in part for the damages claimed to have resulted from the alleged conversion. Were it not so, we might accept the amount of the proceeds of the sale of the personal property as stated by defendant as being the amount which plaintiff should recover, and require a remittitur on his part from the amount of the verdict as rendered to make it meet this view, but the two were parts of the same transaction, and necessarily so closely connected that it seems, with all the information which can be derived from the record before us, that they must stand or fall together. This being the conclusion reached, it follows from what has been hereinbefore said in relation to portions of the proceedings during the trial that the judgment of the district court must be reversed and the case remanded.

REVERSED AND REMANDED.

GEORGE WARNICK, APPELLEE, v. SILAS LATTA, APPELLANT.

FILED APRIL 16, 1895. No. 5514.

Quieting Title: CANCELLATION OF CONTRACT: REVIEW: SUFFICIENCY OF EVIDENCE. On this appeal the only question presented being the sufficiency of the evidence to sustain the decree of the district court, and a full consideration of all the proofs being found to justify such decree, it is affirmed.

APPEAL from the district court of Phelps county. Heard below before BEALL, J.

C. H. Roberts and E. M. Palmer, for appellant.

J. R. Patrick, contra.

RYAN, C.

In the district court of Phelps county this action was begun for the purpose of removing from the title of plaintiff to certain land a cloud alleged to exist from the records of that county disclosing the following contract, to-wit:

“We, L. D. Vanderhoof and J. H. Johnson, being duly appointed and authorized agents of Mrs. B. Bartlett to sell N. W. $\frac{1}{4}$ of sec. 28, town 6 north, of range 18 W., having been appointed by Mrs. Bartlett in writing, and after request to sell the same for thirty-eight hundred dollars, we have sold the said tract of land to S. A. Dravo and Silas Latta on the first day of June, 1887, for thirty-eight hundred dollars, all cash, and payments to suit Mrs. Bartlett, having received from Dravo and Latta fifty dollars and their agreement to settle the rest as soon as a deed is delivered to Vanderhoof & Johnson, Dravo and Latta assuming mortgage, but mortgage to be deducted from the original purchase price; and the said Dravo and Silas Latta agree to purchase said land upon the terms heretofore mentioned

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and pay said sum of thirty-eight hundred dollars, assuming said mortgage as a part thereof.

"MRS. B. BARTLETT,

"By VANDERHOOF & JOHNSON,

"Her Agents.

"S. A. DRAVO & SILAS LATTA.

"Dated June 1, 1887."

There were filed separate answers by S. A. Dravo and Silas Latta. In substance, the answer for S. A. Dravo was a disclaimer of any interest in himself by reason of having received a promissory note for two hundred dollars from Mrs. Bartlett in consideration of releasing her from the above contract. In addition to the above averments of the answer of Dravo, he, at considerable length, disclaimed that in settling and receiving the \$200 note, he in any way represented or concluded Mr. Latta. By the answer of Latta it was admitted that the contract was made in the terms above set out and had been filed for record in the county clerk's office of Phelps county, and that plaintiff had received a warranty deed from Mrs. Bartlett, but it was alleged that the deed was received with actual and constructive notice of the rights of Latta. There was also an offer to pay \$1,900 to Mrs. Bartlett, and a prayer for a decree requiring conveyance to Silas Latta. There was a decree in favor of George Warnick as against Latta, who alone appeals.

There is no room for question that the decree quieting all claim of the appellant was right, for it was satisfactorily shown that Warnick purchased without actual notice of the existence of the above copied contract. It is scarcely necessary to observe that, without being witnessed or acknowledged, this instrument should not have been recorded, and that if, nevertheless, the county clerk did record the same, the mere fact that without authority it was placed upon the record would not constructively impart notice of its contents. It scarcely admits of doubt that the payment of

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the \$200 consideration to Dravo by note was made and received in settlement of the claims made both by Dravo and Latta, and that the present litigation is due solely to the fact that Dravo now retains as his own the entire proceeds of the note turned out to him. In effecting the transfer of title from Mrs. Bartlett to Mr. Warnick, Dravo made out the necessary deed and, in advance, passed upon the title which thereby would be vested in Mr. Warnick. The existence upon the records of the above contract he regarded as of little consequence, for, before this time Latta had withdrawn the earnest money which he had paid to Mrs. Bartlett's agents above named, and as Dravo assumed, the rights of Latta thereby ceased to exist. After this action was begun Dravo withdrew his proportion of the earnest money deposited with the agents of Mrs. Bartlett, and thenceforward he has done all he could to enable Mr. Latta to obtain an amount equal to that which he himself had received. In view of all the facts disclosed in evidence, we are at a loss to understand why any portion of the costs was taxed against Warnick. In this court he has not complained, doubtless because he wished to avoid delays, yet this omission precludes relief. When the case is remanded to the district court for further proceedings it will not be inappropriate, neither will it be too late, to move for a retaxation of costs, if such course is deemed advisable. The judgment of the district court is

AFFIRMED.

LOUIS EHRLICH V. STATE OF NEBRASKA.

FILED APRIL 16, 1895. No. 5807.

Oral Instructions: CRIMINAL LAW. Under the provisions of sections 52 to 56, chapter 19, Compiled Statutes, the giving of oral instructions in either civil or criminal cases, without a waiver of the statutory requirement that they be given in writing, is reversible error. An oral instruction, over proper objections, having been given in this case in disregard of the above statutory provisions, the judgment of the district court is reversed.

ERROR to the district court for Seward county. Tried below before MILLER, J.

Norral Bros. & Lowley, for plaintiff in error.

George H. Hastings, Attorney General, contra.

RYAN, C.

This case was submitted for our determination on April 5, 1895, and in accordance with the practice of this court in criminal cases is decided at the earliest practicable moment. The plaintiff in error was convicted in the district court of Seward county of an attempt to commit the crime of rape upon the person of a female child under the age of fifteen years. The case of *Hall v. State*, 40 Neb., 320, will probably be found instructive as to several propositions discussed, hence they shall not receive special consideration. Among other instructions one was given to the effect that if the accused at any time administered drugs to the complaining witness in furtherance of his criminal design, such use of drugs would constitute an assault, whether successful or not. On the day following that upon which the case was submitted, the jury returned into court and by a communication signed by their foreman asked "further information" in regard to the subject-matter of the above in-

struction. The court thereupon, in the absence of the accused, notwithstanding objections of counsel for the accused, orally instructed the jury as follows: "Gentlemen of the jury: By the using of the word 'may' in this instruction means that the offense can be committed by the defendant laying a hand upon a female child by a male person over eighteen years of age; or, in other words, that if from the testimony you should find that the defendant indecently handled or fondled the complaining witness in this case, that such would be an offense under the statute." By an act of the legislature of this state approved February 19, 1875, now embodied in chapter 19 of the Compiled Statutes as sections 52 to 56 inclusive, it is required that all instructions, whether in criminal or civil cases, in the absence of an express waiver in open court entered of record, shall be written, and that they must be read to the jury. Section 56 of said chapter contains the following provisions: "No oral explanation of any instruction authorized by the preceding sections shall in any case be allowed, and any instruction or charge, or any portion of a charge or instructions given to the jury by the court and not reduced to writing as aforesaid, * * * shall be error in the trial of the case and sufficient cause for the reversal of the judgment rendered therein." There is under this statute no alternative, and the judgment of the district court is

REVERSED.

NORVAL, C. J., not sitting.

KATHARINE VAUGHN V. WILLIAM H. CRITES ET AL.**FILED APRIL 16, 1895. No. 6130.**

1. **Misconduct of a Juror: HARMLESS ERROR.** Misconduct of a juror, urged by a party whom such misconduct, if established, could not have injured, is not available in error proceedings in the supreme court.
2. **Instructions: BILL OF EXCEPTIONS: ARRANGEMENT.** An instruction to find for plaintiff—the party asking it—was properly refused, where the effect to be given certain evidence was therein misstated and made subordinate to propositions of fact with which, logically, it had no relation.

ERROR from the district court of Merrick county. Tried below before **SULLIVAN, J.**

John Patterson, for plaintiff in error.

W. T. Thompson and *J. W. Sparks*, *contra*.

RYAN, C.

This action of replevin was brought by Katharine Vaughn against William H. Crites for the possession of certain personal property by him, as sheriff, levied upon for the satisfaction of two executions. In the petition it was asserted that Mrs. Vaughn was the absolute owner, and by her proofs she sought to show that she had purchased it from Morgan L. Wright, her son-in-law, before it had been levied upon by virtue of the judgments against him for the satisfaction of which said execution was issued. The existence and good faith of this transfer as against the aforesaid judgments were the questions litigated between the plaintiff and the defendant above named. During the pendency of the action Isaac V. Traver, as administrator of the estate of Margaret T. Wright, the deceased wife of Morgan L. Wright, was permitted to intervene and assert

that the ownership and right of possession of the disputed property was in himself as such administrator. Issues having been duly joined between all the parties, a trial was had, which resulted in a verdict in favor of the intervenor, on which judgment was duly rendered. The errors complained of are assigned by Katharine Vaughn, as plaintiff in error.

In support of the motion for a new trial there seems to have been filed several affidavits, met by counter-affidavits, between which the issue was whether or not a juror had been guilty of misconduct such as would justify setting aside the verdict afterwards reached. It is unnecessary to consider this proposition for two reasons: The first of these is that the verdict was against the sheriff and the misconduct alleged was with the judgment creditor, for whom the sheriff was acting in the levies sought to be defeated. The other reason is, that the district court of Merrick county, wherein this case was tried, has found adversely to the alleged misconduct as a question of fact on conflicting evidence, and, under such circumstances, its finding of that character is conclusive. That the filing of these affidavits may not be entirely without result, however, this opportunity is taken for saying that a bill of exceptions should have some definite point of commencement. In this case, immediately following the certificate of the clerk to the transcript, there is met, without any warning, a succession of original affidavits in which the chirography is of various styles. On a cover attached to these affidavits is this inscription: "Affidavits used by deft's upon the hearing of the motion for a new trial." In the midst of the entire bundle of affidavits there is a like inscription upon one affidavit, the only difference being the substitution of the word plaintiff for defendant. Among these latter affidavits two are marked "Exhibit A" and one is marked "Exhibit B." Following all these affidavits there succeeds first a copy of two "schedules of personal property" marked Ex-

hibit No. 2, then a copy of a petition of above twelve pages of what, by a stretch of courtesy, might be called written matter, which is marked "Exhibit A;" then, in cheerful and confusing succession, there follows a copy of a deed, marked "'Exhibit B,' received in evidence upon the trial of said cause, as shown upon page 32 of said bill of exceptions," after which is "a list of hotel furniture and fixtures sold to Katharine Vaughn, July 10, 1891," indorsed "Exhibit A, received in evidence on the trial of said cause, as shown on page 14 of this bill of exceptions." Perhaps it may serve to extenuate these offenses to remark that in some instances the descriptive words quoted were written in red ink. Following the affidavits and exhibits just described there is a page containing neat, type-written lists of witnesses, each with proper descriptive headings. On the page following this there is found the title of the case, immediately after which are the words "Katharine Vaughn, sworn by the plaintiff; examined in chief by Mr. Patterson." Then follow in good type-written copy alternate questions and answers of different witnesses, with objections, the rulings of the court and exceptions thereto and admissions of facts, until finally there is reached the certificate of the reporter. It is within the knowledge of the writer hereof that the above hodgepodge method of presenting affidavits very nearly led to their being entirely disregarded in one instance, owing to circumstances which might exist in any case. There is, therefore, a real necessity that the bill of exceptions should begin with a proper caption, and that within such bill, or attached to it and identified by the judge settling the same, there should be such reference to exhibits as will preclude the possibility of any mistake.

It is urged that the court erred in its refusal to give the fourth instruction requested by the plaintiff, in which was this language:

"4. The jury are further instructed that, although you

may find from all the evidence in the case that the property in controversy was in the year 1890 listed for taxable purposes in the name of Margaret T. Wright, the wife of said Morgan L. Wright at said time, still, if you further find from all the evidence in the case that the said property was the fruits of the joint earnings and accumulations of the said Morgan L. Wright and the said Margaret T. Wright during coverture and during the time they lived together as husband and wife, and that the said Morgan L. Wright had not transferred the title to the said property to the said Margaret T. Wright during her lifetime by gift, settlement, sale, conveyance, or otherwise, then you should find for the plaintiff, Katharine Vaughn," etc.

The above instruction concludes with a proviso as to the rights of creditors as against the title of Katharine Vaughn being dependent upon the good faith of the transfer,—a proposition which need not be discussed, since, in this court, parties who might be interested in that question have no contention with each other. The only part of the instruction requested, therefore, with which we are concerned is that which laid down the proposition that if, in 1890, the property was listed for taxation in the name of Mrs. Wright, and the same had been earned by herself and her husband jointly, and Morgan L. Wright during the lifetime of his wife had not transferred it to her, then that the jury should find for the plaintiff. The legal proposition assumed to be asserted in this instruction was stated in such terms that it was really dependent in no way upon the manner in which the listing for taxation took place in 1890. The evidence of the assessor was that in 1890 Morgan L. Wright stated to him that the property belonged to Mrs. Wright and that she would have to give it in for assessment, and in 1891 plaintiff told witness that Dr. Whittaker was in possession of the personal property as trustee for the children of Mr. and Mrs. Wright. The schedule for 1890 was accordingly verified by Mrs. Wright

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and the property was therein described as individually her own. The evidence as to the assessment of this property was therefore important, as tending to contradict that of Morgan L. Wright, and the court very properly refused the requested instruction which ignored the bearing of this testimony in that direction.

As to the remaining assignments of error, that the verdict was not sustained by the evidence and was contrary to law, it is merely necessary to say that we do not agree with counsel for plaintiff as to either of these propositions. The judgment of the district court is

AFFIRMED.

NEW HOME SEWING MACHINE COMPANY V. ADONIRAM
J. BEALS.

FILED APRIL 16, 1895. No. 6153.

Attachment: LIEN OF LEVY: PURCHASE MONEY NOTES. The levy of a writ of attachment creates a priority over rights reserved or created by conditions contained in unrecorded notes given by the attachment debtor for the purchase price of the personal property levied upon.

ERROR from the district court of Fillmore county. Tried below before HASTINGS, J.

F. B. Donisthorpe, for plaintiff in error.

Charles H. Sloan, contra.

RYAN, C.

This action was brought to recover fifty dollars, the alleged value of a Prescott organ. There was a verdict and judgment in favor of the defendant. The defendant, by

virtue of a writ of attachment in his hands against George W. Chapman, as a constable of Fillmore county, levied upon the above described organ, which he afterwards sold under authority of an execution issued in the same cause as that wherein the levy of the above writ of attachment had been made. It was a disputed fact whether or not the organ, when taken under the writ of attachment, was locked in a room wherein it had been left by George W. Chapman when in the night-time he rather suddenly left Geneva. On behalf of the plaintiff it was testified that the musical instrument in question had been left locked in the room of which the key was given to his cousin, J. W. Kennedy; that George W. had instructed this cousin, a drayman at Geneva, to deliver the organ to Mr. Daley, the resident agent for the plaintiff, but that, being delayed by other matters, this request was not at once complied with, and meanwhile that the levy complained of had been accomplished, the required entrance therefor having been forcibly made. On the part of the defendant the evidence was that the organ was left in the room by Chapman; that there was no door locked, though there were several through either of which an entrance could be effected; that under these circumstances the levy of the writ of attachment was made. It was testified by two witnesses, without contradiction, that after the levy Mr. Kennedy came after certain articles left by Mr. Chapman in the room where the organ was, and his attention being called to the organ, that he disclaimed having any directions with regard to it. Afterwards there was served upon the defendant a notice that the plaintiff was the owner of the organ upon which the writ of attachment had been levied. Since the above disputed questions of fact were settled by the jury in favor of the defendant, there remains but one phase of the case for consideration.

The plaintiff was the assignee of two notes made by Chapman to E. H. Daley, its agent, and claims that by

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virtue of the terms of said notes it was entitled to the organ or to its value. These notes, on which there was due \$5 per month, were given for the organ, and each contained the following provisions immediately following the dates whereon the respective five-dollar payments should become due, to-wit: "For value received, I, or we, the undersigned, do hereby sell and mortgage unto the payee hereof one Prescott organ, No. —, now in my possession, provided that if the undersigned shall pay the said debt, then this mortgage shall be void. In case of default, I, or we, authorize the said mortgagee to seize and sell said property and pay said debt with expenses incurred; or if the said mortgagee shall at any time feel unsafe or insecure, then he may seize and sell the property." It was admitted in open court that the notes which contained the above provisions were never filed for record. The district court very properly instructed, under these circumstances, that the levy of the writ of attachment was entitled to priority over rights reserved or created by the above conditions. The judgment of the district court is

AFFIRMED.

**GUS SCHRAGE ET AL., APPELLEES, V. L. N. MILLER
ET AL., APPELLANTS.**

FILED APRIL 16, 1895. No. 6419.

Landlord and Tenant: REPAIR OF BUILDINGS: MECHANICS' LIENS. A requirement in a lease, that the lessee shall to a specified amount "put cash in repairs" upon the leased premises, confers no right of charging such repairs when made against the landlord or his property.

APPEAL from the district court of Dodge county. Heard below before SULLIVAN, J.

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Frick & Dolezal, for appellants, cited: 15 Am. & Eng. Ency. Law, 19; *Knapp v. Brown*, 45 N. Y., 207; *Muldoon v. Pitt*, 54 N. Y., 269; *Hickmann v. Pinkney*, 81 N. Y., 216; *Cornell v. Barney*, 94 N. Y., 394; *Boteler v. Espen*, 99 Pa. St., 313.

Fred W. Vaughn, contra, cited: *O'Neil v. St. Olaf's School*, 26 Minn., 329; *Meyer v. Berlandi*, 40 N. W. Rep. [Minn.], 513; *Laird v. Moonan*, 32 Minn., 358; *Hill v. Gill*, 42 N. W. Rep. [Minn.], 295; *Bohn Mfg. Co. v. Kountze*, 30 Neb., 719; *Henderson v. Connelly*, 123 Ill., 98; *Millsap v. Ball*, 30 Neb., 728; *Pomeroy v. White Lake Lumber Co.*, 33 Neb., 243.

RYAN, C.

The defendants Edwin L. and Josephine A. Eno, on the 4th day of November, 1888, leased their hotel known as the Eno Hotel to A. F. Diver for a term of three years, to begin on January 1, 1889. The lessee agreed to take the property leased in the condition in which he should find it when it should be vacated at the commencement of his lease "and not ask of said first parties, the lessors, any money or outlay for repairs during the continuance of said lease, except for such damages as might be caused by the elements." Furthermore, the lessee agreed to put the sum of \$1,200 cash in repairs on said premises, such as painting, papering, kalsomining, etc., but particularly to immediately paint veranda and front of hotel three coats, to be of lead and oil, and first-class work and material, such expense to be included in said outlay of \$1,200. On the 5th day of July, 1889, the lessee assigned his interest in the above lease to Louis N. and Katie C. Miller, by whom, thenceforward, the conditions thereof were assumed. The theory upon which the right to an affirmance of the judgment of the district court of Dodge county enforcing a mechanic's lien against the above property must be founded,

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if at all, must be circumscribed by the statements of the affidavit filed by the appellees. The portion which has any bearing on this question was in this language: "Gus Schrage, being first duly sworn, says that affiant and C. H. Stoner, under and by virtue of a verbal contract entered into with L. N. Miller and Katie C. Miller, lessees and proprietors of the Eno Hotel, in the city of Fremont, Nebraska, held and occupied by them under and by virtue of a contract and lease executed and made by Edwin L. Eno and Josephine A. Eno with A. F. Diver, and which lease and contract was sold and assigned by said A. F. Diver to said L. N. Miller and Katie C. Miller, by and with the consent of said Edwin L. Eno and Josephine A. Eno, whereby the said lessors were bound and compelled to make repairs upon said Eno Hotel for a given sum as part rent and consideration of said lease, that, under and by virtue of said contract, this affiant and said C. H. Stoner furnished material, consisting of wall paper and paint, and performed work and labor in connection with said wall paper and paint in repairing and fixing said rooms of said Eno Hotel to the amount of one hundred and sixty-seven $\frac{58}{100}$ (\$167.58) dollars, upon which there has been paid and credited the sum of one hundred and sixteen $\frac{40}{100}$ (\$116.40) dollars, leaving a balance due this affiant and C. H. Stoner of the sum of fifty-one $\frac{18}{100}$ (\$51.18) dollars." The decree was for the amount just stated with costs.

It is very clear that the plaintiffs were not entitled to a lien because of having furnished material and performed labor under a contract therefor with the lessees as such. (*Waterman v. Stout*, 38 Neb., 396.) Probably this was not so much hoped for, as that, under the requirement of payment for repairs, it should be assumed that the lessee was impliedly constituted the landlord's agent in respect thereto. The language above quoted from the affidavit seems to countenance this theory, and it is urged in the brief for the appellees. By the terms of the lease, however, it was

agreed that the lessee would not ask of the lessors the outlay for repairs of the kind described in the above mentioned affidavit. Aside from this, the terms of the lease were not as indicated in the above affidavit, for the requirement was not that the lessee should make repairs of the value of \$1,200, but that he should put the sum of \$1,200 cash in repairs; in other words, that a part of the consideration for the three years lease was the payment of \$1,200, which should be made for repairs, which repairs would inure to the benefit of the lessee until the expiration of his term. This was not a requirement to make repairs, requiring payment to be made, perhaps, by the lessors. It was an authority solely to pay cash to the extent and for the purposes indicated. Under such conditions the estate of the lessors was not bound. (*Hoagland v. Lowe*, 39 Neb., 397; *Henry & Coatsworth Co. v. Fisher*, 37 Neb., 207; *Pickens v. Plattsmouth Investment Co.*, 37 Neb., 272; *Holmes v. Hutchins*, 38 Neb., 601; *Sheehy v. Fulton*, 38 Neb., 691.) It follows, therefore, that the judgment of the district court subjecting the property of the appellants to the payment of the indebtedness found due from other parties was without warrant, and it is therefore

REVERSED.

JOHN J. O'ROURKE V. JOHN N. BURKE ET AL.

FILED APRIL 16, 1895. No. 6373.

1. **Guaranty: BUILDING CONTRACT.** In a building contract it was provided, in effect, that a part of the compensation might be paid on the pay-roll every two weeks as the work progressed, and furthermore, that in case of payment a certificate should be obtained from the architect, among other things, to the effect that he considered the payment due. *Held*, That to the amount of payments of the pay-rolls made without the required certificate

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the guarantor of compliance with the terms of his agreement by the contractor was discharged.

2. **Building Contracts.** The reservation of the right at his own option to make payments by assuming lumber bills, of necessity excluded the inference therefrom that the proprietor assumed payment of lumber bills, of the existence of which he had no knowledge.
3. ———. The reservation of the right to make changes in the plans to be followed in the erection of a building implies, as against a mere guarantor of performance by the contractor for the erection of such building, that the changes shall be such as reasonably might be considered as within the contemplation of the parties principal at the time such building contract was entered into.

ERROR from the district court of Douglas county. Tried below before DAVIS, J.

The facts are stated by the commissioner.

Charles Offutt and Charles S. Lobingier, for plaintiff in error:

The surety was released by Burke's failure to retain the two-hundred-dollar reserve. (*Bell v. Paul*, 35 Neb., 240; *Simonson v. Thori*, 31 N. W. Rep. [Minn.], 861; *Calvert v. London Dock Co.*, 2 Keen [Eng. Ch.], 638; *Board of Commissioners v. Branham*, 57 Fed. Rep., 179.) He was also released by the failure to require certificate from the architect or to make payments "on the pay roll" to the laborers. (*Hayden v. Cook*, 34 Neb., 677.) A further ground of release is found in the unreasonable changes which were made in the plans without the consent of the surety and which materially increased the cost beyond the contract price. (*Consaul v. Sheldon*, 35 Neb., 247; *McLeod v. Genius*, 31 Neb., 6.) Whether the changes were unreasonable and the increase material were questions of law for the court. (*Oliver v. Hawley*, 5 Neb., 439; *Memphis Branch R. Co. v. Sullivan*, 57 Ga., 240; *Mispelhorn v. Farmers Fire Ins. Co.*, 53 Md., 473; *Pemberton v. Dooley*,

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43 Mo., App., 176; *Chicago, B. & Q. R. Co. v. McLallen*, 84 Ill., 116; *Penn Mutual Life Ins. Co. v. Crane*, 134 Mass., 56; *Gallon v. Van Wormer*, 21 S. W. Rep. [Tex.], 547; *Chicago, B. & Q. R. Co. v. Landauer*, 36 Neb., 642.) All the provisions of the contract are to be construed most strictly in favor of O'Rourke. (*Miller v. Stewart*, 9 Wheat. [U. S.], 638; *Crane Co. v. Specht*, 39 Neb., 123, annotated, 38 Cent. L. J., 387.)

Francis A. Brogan, contra, cited as to the retention of the reserve: *Foster v. Dohle*, 17 Neb., 631; *Irish v. Pheby*, 28 Neb., 231; *Consaul v. Sheldon*, 35 Neb., 247.

RYAN, C.

This action was brought in the Douglas county district court by John N. Burke against D. A. Way, the principal, and John J. O'Rourke, his surety, on a building contractor's bond which had been executed to Mr. Burke. There were alleged in the petition several failures of the principal to perform according to the terms of his contract, followed by a prayer for judgment for \$1,500, the penal sum named in the bond sued upon. There was a verdict for the sum of \$950, on which the judgment now complained of was duly rendered against O'Rourke, who alone defended. The contract for the faithful performance of the terms of which the above bond was entered into was dated May 12, 1891. It required D. A. Way, on or before June 24, 1891, to build to completion a certain hotel and hand ball court according to the requirements of certain plans and specifications therein referred to. The principal contentions which we shall consider were as to the manner in which payments of the amounts due under such contract should be made. The contract itself was prepared for signature by filling out the blanks in a printed form. This was done by an architect in such a manner as to render applicable Mrs. Quickley's description of bad language as an

"abusing of God's patience and the king's English." It is a well recognized rule that where a printed form has been filled out the written language controls that which is printed. The difficulty of determining just what was agreed can be illustrated only by quoting the exact written language with its defective orthography, its misplaced capital letters, and absence of punctuation, just as they exist. The provisions as to payments were in the following partly printed and partly written language, that which was written being indicated by the use of italics:

"*John Burke* * * * will well and truly pay, or cause to be paid unto the part— of the first part or unto *D. A. Way* heirs executors administrators or assigns the sum of \$2143.80 cents Dollars lawful money of the United States of America in manner following: On — 1891, \$2143.80 cents—the first payment in 2 weeks or the pay Role Every two weeks as the work progresses and *John Burk* Reserves the wright to asomes the lumber Bills But to keep Back two hundred dollars untill the work is all complete and excepted when the building—is all complete and after the expiration of 10 days when all the Drawings and Specifications have been returned to J. W. Boileau Architect:

"Provided that in each case of the said payments a certificate shall be obtained from and signed by J. W. Boileau Architect to the effect that the work is done in strict accordance with Drawings and Specifications and that he J. W. Boileau considers the payment properly due," etc.

In the petition it was alleged "that during the progress of said work the plaintiff paid to the said Daniel A. Way, upon the written certificate of plaintiff's architect, the sum of seven hundred and sixty-eight dollars and five cents (\$768.05)." In the answer there was pleaded an entire failure to require a certificate of the architect showing that the work had been done in the manner required, or, that J. W. Boileau considered payments properly due. By reply the plaintiff denied that he was required by the terms

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of the contract to make said payments to the plaintiff for the purpose of paying the pay-roll only upon the production of a certificate from the architect, and alleged the fact to be that no certificate was by the terms of said contract required to be obtained from the said architect for the payment of the amount necessary for the pay-roll every two weeks during the progress of the said work, and that each and every payment made to the contractor during the progress of said work was made upon orders signed by the architect. At random from the bill of exceptions, we quote some of the orders on which payments were made, to-wit:

"Mr. John Burke, please pay to the contractor, D. A. Way, the sum of \$100.00, as estimate on building.

"J. W. BOILEAU."

"Mr. John Bork, please pay to J. C. Pottinger the sum of \$25.40. J. W. Boileau, Superintendent. Charge the same to plaster account."

"Mr. John Bork, pay D. A. Way five dollars on account O. K. J. W. BOILEAU, *Superintendent*."

"John Bork, please pay to D. A. Way the sum of \$246.90. J. W. BOILEAU on building, *Superintendent*."

The above are samples of such orders as were in evidence, and from the testimony of witnesses and the averments of the reply above referred to it is quite evident that whatever else was issued by Mr. Boileau precedent to payments were in the same style. It must therefore be accepted as beyond question that each payment on the pay-rolls was made without obtaining a certificate from the architect as to how the work had been done and that he considered the said payment properly due. As we understand the written language quoted from the contract, the terms were that the first payment was to be in two weeks to D. A. Way, or the pay-roll (to be paid D. A. Way) every two weeks as the work progressed; in other words,

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Mr. Burke was to make payment according to the pay-rolls at intervals of two weeks as the work progressed. By the printed proviso it was further required that as evidence that each pay-roll showed correctly what was payable, there should be obtained a certificate of the architect that he considered the sum shown by the pay-roll as at the time properly due. If at the time this suit was brought the plaintiff had in his hands money due for labor done under the above contract he could not recover from the surety the amount withheld from the principal. If that money was at one time in his hands and he paid it to the principal he must, to entitle himself to a recovery as against the surety *pro tanto*, be able to show that the payment to the principal was not in disregard of the terms of the contract as to which the surety sustained the relation of guarantor. As was said in *Brennan v. Clark*, 29 Neb., 385: "The rule is well settled that a surety is bound in the manner and to the extent provided in the obligation executed by him, and no further." See, also, *Bell v. Paul*, 35 Neb., 240, wherein it was held under a contract restricting payments to eighty-five per cent of the amounts of work done as shown by estimates of the architect, that payments in excess of eighty-five per cent without consent of the surety or estimate by the architect discharged such surety. The same principle was recognized in *Hayden v. Cook*, 34 Neb., 670. In the case at bar it was not shown that there was ever made by the architect a certificate which would justify payment of the amount of any fortnightly pay-roll. Payment without such certificate was, as against the surety, as though there was no payment whatever. As it is undisputed that the verdict was reached upon the assumption that such payments as were made upon the pay-rolls were properly made, the judgment of the district court must be reversed.

As to the construction to be given to the language whereby Mr. Burke reserved the right to assume the lumber bills, we are of opinion that the district court properly

held that the lumber bills contemplated were such as were known to Mr. Burke, for it could hardly have been expected that he would undertake to exercise a right of option as to that of the existence of which he was ignorant. The amount of the pay-rolls and of the lumber bills in the aggregate assumed, however, should not have been in excess of \$1,943.80; that is to say, there should have been held back by Burke the sum of \$200. On his theory, as we understand it, this was done. In the contract between Mr. Way and Mr. Burke was the following provision: "Third—Should the proprietor at any time during the progress of the said works require any alterations of, deviations from, additions to, or omissions in the said contract, specifications, or plans, he shall have the right and power to make such change or changes, and the same shall in no way injuriously affect or make void the contract, but the difference for work omitted shall be deducted from the amount of the contract by a fair and reasonable valuation; and for additional work required in alterations the amount based upon the same prices at which the contract is taken shall be agreed upon before commencing additions as provided and hereinafter as set forth in article No. 6, and such agreement shall state also the extension of time (if any) which is to be granted by reason thereof." In the construction of the building changes were made which involved greater cost than was originally contemplated, but these changes in advance were arranged for between Mr. Way and Mr. Burke, consistently with the provisions of their contract in respect thereto. The surety nevertheless contends that the departure from the plans and specifications operated to relieve him of liability. The instruction of the court, very aptly defining the rights of the surety in this respect, was in the following language: "You are instructed that under the contract the parties thereto had a right to agree to alterations, additions, or changes in the building without avoiding the contract, but that, in such

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case, if such changes or additions increased the cost of the building, the amount thereof should be added to the contract price and the plaintiff would become liable to pay for such increased cost; provided, however, that if such changes unreasonably increased the cost of the building beyond what might reasonably be within the contemplation of the parties at the time of making the contract, such unreasonable changes would have the effect of discharging the surety. It is for you to say whether the changes and additions shown by the evidence were unreasonable or such as would not ordinarily in a building contract of this character be considered as likely or probable. If you believe from the evidence that such changes and additions were unreasonable, you should find for the defendant O'Rourke. If, however, you believe, considering all of the circumstances, that they were reasonable and such as would be likely to arise in contracts of this nature, the defendant, O'Rourke would not on that account be discharged. In considering whether the changes were reasonable or not you may, in connection with all the circumstances, take into consideration the relative cost of the building, as originally planned, and of the amount of the changes made in the plans." The surety could not properly ask, in the face of express provisions admitting of changes being made, that he should be protected against such changes, so long as they were reasonable and such as when the contract was made might have been contemplated as falling within the reservation of the right to make changes as above expressed. For the reasons hereinbefore stated the judgment of the district court is

REVERSED.

M. A. BLACHFORD V. PETER FRENZER.

FILED APRIL 16, 1895. No. 5779.

44	829
60	429

1. **Forcible Entry and Detainer: CONSTRUCTION OF STATUTE.** Section 1023 of the Code of Civil Procedure construed. The legislature designed by the enactment of this statute to provide a summary remedy by which the owner of real estate might regain possession of it from one who had unlawfully and forcibly entered into and detained possession thereof, or one who, having lawfully entered, then unlawfully and forcibly detained possession.
2. **Justice of the Peace: JURISDICTION: FORCIBLE ENTRY AND DETAINER: PLEADING.** Justices of the peace have original jurisdiction of this class of cases; and it was not the intention of the legislature that the rule which requires the pleader to state the facts constituting his cause of action or defense should be applied to complaints in forcible detainer actions.
3. **Forcible Entry and Detainer: PLEADING.** The complaint of unlawful and forcible detention, to be good under this section, need not aver facts which show that the defendant unlawfully and forcibly detains possession of the premises. The complaint is sufficient if it is in the language of the statute.
4. **Landlord and Tenant: LEASE: NOTICE.** A subtenant is charged with notice of the existence of the tenant's lease and bound by its terms and conditions.

ERROR from the district court of Douglas county. Tried below before IRVINE, J.

Hall, McCulloch & English, for plaintiff in error.

Howard B. Smith, contra, cited: *Lee v. Stiles*, 21 Conn., 500; *Ladd v. Dubroca*, 45 Ala., 421; *Barto v. Abbe*, 16 O., 408; *Brown v. Burdick*, 25 O. St., 260; *Grant v. Marshall*, 12 Neb., 488.

RAGAN, C.

This is a petition in error prosecuted to this court by Mrs. M. A. Blachford to reverse a judgment of the district court

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of Douglas county rendered against her in favor of Peter Frenzer. The action was forcible detainer and brought by Frenzer against one C. E. Ham and the plaintiff in error. The jury in the district court found Mrs. Ham not guilty, and a judgment to go hence without day was by the district court pronounced in her favor. The jury found a verdict of guilty against Mrs. Blachford, on which the judgment was pronounced, which she seeks to reverse by this proceeding.

1. The first contention is that the complaint filed in the action before the justice of the peace, and on which complaint the action was tried in the district court, does not state facts sufficient to constitute a cause of action; or, as counsel for the plaintiff in error put it, such complaint was so defective as to render the action of the district court, in admitting any evidence under it on behalf of Frenzer, error. The complaint was as follows: "Peter Frenzer, the plaintiff herein, complains of the defendants C. E. Ham and M. A. Blachford, * * * for that the plaintiff is seized in fee-simple of the following described premises, to-wit: [Here follows description of premises.] That on or about the 15th day of December, 1889, the plaintiff leased the said premises to the defendant C. E. Ham for the term of one month at \$110 per month, payable in advance, and that the said period has since elapsed; that the plaintiff has repeatedly demanded the rent of said premises for the month beginning March 15, 1890, which was refused, yet the said defendant Mrs. M. A. Blachford, who is the actual occupant of the said premises, unlawfully and forcibly detains possession of said premises and unlawfully and forcibly holds over the term of said lease; that on the 19th day March, 1890, the said plaintiff served on the said defendant a notice in writing," etc. Section 1023 of the Code of Civil Procedure provides: "The summons [in an action of forcible detainer] shall not issue until the plaintiff shall have filed his complaint in writing with the

justice, which shall particularly describe the premises so entered upon or detained, and shall set forth either an unlawful and forcible entry and detention, or an unlawful and forcible detention after a peaceable or lawful entry of the described premises." The defect said to exist in this complaint is that it contains no allegation of facts as to how or when or under what circumstances Mrs. Blachford obtained possession of said premises; that it contains no averment of fact showing that she was the tenant of Frenzer; in other words, that the language of the complaint, that Mrs. Blachford "unlawfully and forcibly detains possession of said premises and unlawfully and forcibly holds over the term of said lease," states mere conclusions, and that there is in the complaint no statement of facts which shows that Mrs. Blachford unlawfully and forcibly detains possession of the premises or unlawfully and forcibly holds over her term. A complaint of unlawful and forcible detention, to be good under this section, need not aver facts which show that the defendant unlawfully and forcibly detains possession of the premises. The complaint is sufficient if it is in the language of the statute. The legislature designed by the enactment of this statute to provide a summary remedy by which the owner of real estate might regain possession of it from one who had unlawfully and forcibly entered into and detained possession thereof; or one who, having lawfully entered, then unlawfully and forcibly detained possession. Justices of the peace have original jurisdiction of this class of cases, and it was not the intention of the legislature that the rule which requires a pleader to state the facts constituting his cause of action or defense should be applied to complaints in forcible detainer actions. (*Barto v. Abbe*, 16 O., 408; *Brown v. Burdick*, 25 O. St., 260.) The complaint states a cause of action; and the assignment of error that the district court erred in admitting any evidence under it on behalf of Frenzer must, therefore, be overruled.

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2. That the verdict of guilty rendered against Mrs. Blachford is not supported by sufficient evidence. The evidence shows that Frenzer made a verbal lease of these premises to Mrs. Ham about the 15th of December, 1889. By the terms of this verbal lease she was to pay \$110 a month rent, payable in advance. At the time of this contract of Mrs. Ham she told Frenzer that Mrs. Blachford was to occupy the premises with her; that Mrs. Blachford and Mrs. Ham both moved into the premises about that date; that within a week from that date trouble arose between Mrs. Ham and Mrs. Blachford and the former left the premises, Mrs. Blachford remaining; that the rent which was paid on the 15th of December, 1889, was paid by Mrs. Blachford; that she paid the rent of the premises on the 15th of January, 1890; that she paid the rent on the 15th of February, 1890; that she paid the rent up to the 15th of March, 1890. About the 15th of March, 1890, Frenzer demanded of Mrs. Blachford another month's rent, and "she promised that she would go and get it right off and pay." She said: "I will go and get it ready and pay you. I will go and get it right off and pay you." On the 17th or 18th of March, Frenzer again demanded of Mrs. Blachford his rent, and she answered that "she would go and get it down town;" but the rent was never paid. This evidence, we think, shows that Mrs. Blachford was occupying these premises as the tenant of Frenzer from the 15th of January, 1890, and that at the time this action was brought she was unlawfully and forcibly holding over her term. The evidence in the bill of exceptions before us does not show or tend to show that Mrs. Blachford was a subtenant of Mrs. Ham, nor do we think it would make any difference in the result if it did. So far as the evidence shows, Mrs. Blachford entered into the possession of these premises lawfully. If she entered as a tenant under Mrs. Ham, then she was bound by the terms of Mrs. Ham's lease, of the existence and terms of which she was

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bound to take notice; and if she held possession of the premises, as tenant under Mrs. Ham, or otherwise, after the rent matured by the terms of the lease, she was guilty of unlawfully and forcibly detaining possession of the premises. The verdict and judgment are the only ones that could have been rightfully rendered under the pleadings and evidence of the case, and the judgment of the district court is

AFFIRMED.

IRVINE, C., not sitting.

**JAMES PEARSALL, APPELLEE, V. COLUMBUS CREAMERY
COMPANY, APPELLANT.**

FILED APRIL 16, 1895. No. 5757.

Mechanics' Liens: EVIDENCE: REVIEW. This case involves no disputed question of law. The evidence examined, and *held* to support the finding and decree of the district court, and the judgment appealed from is accordingly affirmed.

APPEAL from the district court of Platte county. Heard below before MARSHALL, J.

Whitmoyer & Gondring, for appellant.

J. G. Reeder, contra.

RAGAN C.

James Pearsall brought this action in the district court of Platte county against the Columbus Creamery Company. The object of the action was to have established and foreclosed a lien for labor and materials which Pearsall alleged he had furnished the Creamery Company for the erection of an improvement on certain real estate belonging

 Central Loan & Trust Co. v. O'Sullivan.

to it. Pearsall had a decree and the Creamery Company has appealed. A large part of the claim of Pearsall was for extras. The defenses of the Creamery Company were that Pearsall had not completed the building within the time agreed under his contract, by which the Creamery Company had been delayed in the manufacture of butter and thereby damaged; that the building was not constructed of proper material and in the proper manner; and that it was not liable to Pearsall for the extras claimed. The evidence on all the litigated issues was conflicting. The appeal presents no question of law. The evidence sustains the finding and decree of the district court, and it must, therefore, be and is accordingly

AFFIRMED.

44	834
46	210
44	834
52	762
44	834
56	621

**CENTRAL LOAN & TRUST COMPANY, APPELLANT, V.
MARY O'SULLIVAN ET AL., APPELLEES.**

FILED APRIL 16, 1895. No. 6180.

1. **Mechanics' Liens: HUSBAND AND WIFE: SEPARATE CONTRACTS: CLAIM FOR LIEN: EVIDENCE.** A material-man claimed a lien against the real estate of a married woman for material which he alleged he had furnished for the erection of improvements on said real estate in pursuance of an oral contract with the woman's husband. The items of material for which a lien was claimed were furnished as follows: 1890, February 11, 17; March 3, 6, 8, 17, 19, 22, 25, 26, 31; April 3, 10, 29; May 10, 20, 27; August 20; September 6, 16. *Held*, (1) That the evidence justified the finding of the district court that the items of material furnished between February 11 and May 27 were furnished under and in pursuance of one contract; and that the material furnished from August 20 to September 16 was furnished in pursuance of a separate and independent contract; (2) that the material-man, by filing in the office of the register of deeds of the county where the real estate was situate a verified account of the items of all this material within four months

after September 16, did not thereby acquire a lien against the wife's real estate for any of the material furnished prior to August 20; (3) that the evidence sustained the finding of the district court that the items of material furnished on and after August 20 were sold and furnished by the material-man to the husband individually, and not as agent of his wife, nor on the faith and credit of her real estate.

2. ———: CONSTRUCTION OF STATUTE: CONTRACTS: TACKING.

The mechanics' lien law of the state should not be so construed as to enable a material-man to tack one contract to another and procure a lien for all the material furnished under all the contracts by filing in the office of the register of deeds an itemized account of such material within four months of the date of furnishing the last item of material furnished in pursuance of the last contract.

APPEAL from the district court of Hall county. Heard below before HARRISON, J.

Abbott & Caldwell, for appellant, cited: *Bradford v. Peterson*, 30 Neb., 98; *Howell v. Hathaway*, 28 Neb., 807; *Scales v. Paine*, 13 Neb., 521; *McCormick v. Lawton*, 3 Neb., 449; *Studebaker v. McCargur*, 20 Neb., 500; *Webb v. Hoselton*, 4 Neb., 308; *Kuhns v. Bankes*, 15 Neb., 92.

Charles G. Ryan, contra, cited: *Baker v. Wiswell*, 17 Neb., 52; *Goodman v. White*, 26 Conn., 317; *Ritter v. Stevenson*, 7 Cal., 388; *Donahy v. Clapp*, 12 Cush. [Mass.], 440; *Rogers v. Dickey*, 6 Ill., 636; *St. John v. Hall*, 41 Conn., 522; *Ballou v. Black*, 17 Neb., 396; *Dearie v. Martin*, 78 Pa. St., 55; *Wendt v. Martin*, 89 Ill., 139; *Bradford v. Higgins*, 31 Neb., 196.

RAGAN, C.

The Central Loan & Trust Company brought this suit in the equity side of the district court of Hall county to foreclose a mortgage upon certain real estate situate in said county. The mortgage was executed by Mary O'Sullivan

and Michael O'Sullivan, her husband, who were made defendants to the action. One Spooner R. Howell was also made a defendant to the action, for the reason that he had of record in the office of the register of deeds in said county a verified account of items of certain material which he alleged he had furnished to the O'Sullivans for the erection of improvements upon the real estate covered by the mortgage, and on which real estate he claimed a lien. Howell appeared in the case and filed a disclaimer, and also set out that he had assigned his "lien" to the First National Bank of Chicago, Illinois. This bank was made a defendant to the action, and filed its answer in the nature of a cross-petition, as the assignee of Howell, and claimed a lien against the real estate, the title to the property being in the said Mary O'Sullivan. There were several other parties to the action, but as the only question litigated in the court below was whether said bank was entitled to a mechanic's lien upon the real estate, the connection of other parties to the suit will not be further noticed. The district court found and decreed that the bank had no lien upon the real estate and dismissed its cross-petition, from which decree it has appealed.

1. The items of material which Howell alleges he furnished to the O'Sullivans, and for the value of which he claims a lien upon the real estate, appear, by the verified account of items filed for the purpose of obtaining a lien, to have been furnished as follows: 1890, February 11, 17; March 3, 6, 8, 17, 19, 22, 25, 26, 31; April 3, 10, 29; May 10, 20, 27; August 20; September 6, 16. The total amount claimed was \$143.94; and Howell's contention is that all these items of material were furnished in pursuance of one contract made with Michael O'Sullivan at or about the 11th of February, 1890. The evidence shows that on the 11th of February, 1890, and at all times since then and before that time, Mrs. O'Sullivan was the owner of the real estate in controversy; that Michael O'Sullivan was her husband;

that on that date, prior to that time and until some time prior to the July following, O'Sullivan and his wife resided in the village of Wood River on property there owned by the husband; that the real estate in controversy was a farm some miles distant in the country from the village of Wood River; that about the 11th of February, 1890, Howell's agent made a verbal contract with O'Sullivan, the husband, to furnish him certain material, and that in pursuance of that contract Howell furnished to O'Sullivan, the husband, the items of material from February 11 to May 27, both inclusive; that part of this material was used by Michael O'Sullivan, the husband, in making improvements on the farm of the wife in the country; that Howell had no contract or conversation whatever with Mrs. O'Sullivan in reference to this material; that Howell did not know, at the time of furnishing any of this material between the dates of February 11 and May 27, that Mrs. O'Sullivan was the owner of the farm; that Howell did not extend this credit on the faith and strength of Mrs. O'Sullivan being the owner of this farm. About the 27th of May an accounting was had between Howell and O'Sullivan, the husband, and on that date O'Sullivan, the husband, gave his note to Howell for the amount due him for all material furnished to him up to that time, and O'Sullivan's account was "squared." We reach the conclusion, then, that all the material furnished by Howell to O'Sullivan, the husband, between the dates of February 11 and May 27, 1890, was furnished under one contract made between them about February 11, and that all the material for which Howell claims a lien subsequent to the 27th of May was furnished under a separate and independent contract from the one under which the first group of material between February 11 and May 27 was furnished. The verified account of items claiming a lien was not filed in the office of the recorder of deeds of Hall county until the 16th day of December, 1890, or more than four months

after the 27th day of May, 1890. We have no doubt, then, of the correctness of the finding and decree of the district court denying Howell or his assignee a lien on these premises for the material furnished on the 27th of May, 1890, or at any time prior thereto. We must not be misunderstood in what we are here deciding. We do not decide that Howell, by taking the note of O'Sullivan, the husband, on the 27th of May, 1890, waived his right to a lien against this real estate; but what we do decide is that the evidence justifies the conclusion that even if the material so furnished was furnished to O'Sullivan, the husband, as the agent of his wife, then none of the material furnished subsequently to May 27, 1890, was furnished in pursuance of the original contract made between Howell and O'Sullivan, the husband; or, to express it differently, that the last item of material which Howell furnished in pursuance of his contract made on the 11th of February with O'Sullivan was furnished on May 27, and that to entitle Howell to a lien for such material he must have filed in the office of the recorder of deeds of Hall county a verified account of items of such material and claimed a lien on said premises within four months of May 27. The mechanics' lien law of this state has ever been liberally construed by this court, but it will not be so construed as to enable a material-man to tack one contract to another and procure a lien by filing in the office of the register of deeds an itemized account of the material furnished under all the contracts within four months of the date of furnishing the last item of material under the last contract made.

2. The items in the second group of material are dated: 1890, August 20, \$3.40; September 6, \$2.90; September 16, \$2.80; or a total of \$9.10. At the time this material was furnished by Howell to O'Sullivan, the husband, O'Sullivan and his wife were residing on a farm. The material appears to have been used in making an improvement of some kind upon the farm. Was this material

furnished by Howell in pursuance of a contract between him and O'Sullivan, the husband, the latter then and there acting as the agent of the wife? The record does not disclose that at or before the time of furnishing the last three items of material that Howell ever had any conversation or dealing whatever with Mrs. O'Sullivan; nor is there any evidence in the record that the wife knew that her husband had purchased, or was purchasing or using the three items of material in the erection of improvements upon her real estate, further than such knowledge might be inferred from the fact that during the months of August and September she and her husband were residing on the farm. We think the fair inference is that the wife's real estate received the benefit of these last three items of material, and as they were used in making improvements on the real estate and she was living thereon at the time, that she had actual knowledge that the material was so used. But we are still unable to say that the district court was wrong in finding that these items of material were not furnished by Howell to Mrs. O'Sullivan in pursuance of a contract made with her husband as her agent. The conduct of Howell, throughout his dealings with O'Sullivan from the 11th of February, justifies the conclusion of the district court that he contracted with the husband not as the agent of the wife and not on the faith and credit of her separate property; or rather the evidence is such as will not justify us in saying that the district court reached the wrong conclusion. The appellant called O'Sullivan as a witness and some attempt was made to prove that he was acting as his wife's agent in and about the conduct of the farm and its management, and in buying the items of material under consideration. In so far as this evidence of O'Sullivan militated against the wife, it was incompetent, and we must presume that the district court did not consider it. It is so well settled in this state that, with certain exceptions not material here, a husband cannot be a witness against his

wife, nor the wife against the husband, that it is unnecessary to cite the authorities; and in an equity case, in which a husband or wife is interested as plaintiff or defendant, if one testify to matters against the interest of the other, the district court should not consider such evidence. Aside from the statement of O'Sullivan on the witness stand as to his acting as agent for his wife in the purchasing of the material under consideration, there is practically no evidence in the record to sustain such contention. Counsel cite us to *Howell v. Hathaway*, 28 Neb., 807, where it is said that where a husband erects a dwelling house on land, the title to which is in the name of his wife, and she is aware that such building is being erected, and, in some cases, gives direction to the workmen, the agency of the husband will be presumed and the property will be subject to a mechanic's lien. If Howell had filed his claim for a lien within four months of the 27th of May, 1890, for the material which he furnished between that date and the 11th of February of that year, and which he alleges was used in the erection of an improvement upon the wife's real estate, the case stated might be an authority in point. A wife is not liable to have her real estate charged for a pound of nails or a board purchased by her husband for a material-man, though such nails or such board may be used in the erection or reparation of some improvement upon her real estate; but her property will be subject to the lien of a material-man when it appears not only that her husband, in buying the nails or the board for the purpose of such improvement, was acting as her agent and not buying on his own credit, but also that the material-man parted with the nails and board, not on the credit of the husband, but on the faith and credit of the wife's ownership of the real estate. We think the district court was justified in finding that the last three items of material were not furnished by Howell to Mrs. O'Sullivan through the agency of her husband, but that Howell sold the last

Swindell v. Chicago, B. & Q. R. Co.

items of material to Mr. O'Sullivan individually, gave him credit for them, trusted to him to pay for them, relied upon his credit and not upon the wife's property. The judgment of the district court must be and is

AFFIRMED.

HARRISON, J., not sitting.

DORA SWINDELL, ADMINISTRATRIX, v. CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY.

FILED APRIL 16, 1895. No. 6239.

Action by Administratrix against a Railroad Company for Negligently Causing the Death of her Husband.
THE EVIDENCE examined, and *held* to sustain the finding of the jury (1) that the proximate cause of the deceased's death was not the negligence of the railroad company; or (2) that the proximate cause of the deceased's death was his own negligence; and the judgment is affirmed.

ERROR from the district court of Lancaster county.
Tried below before TIBBETS, J.

Davis & Hibner, for plaintiff in error.

T. M. Marquett, J. W. Deweese, and *F. M. Hall*, *contra*.

RAGAN, C.

Dora Swindell, administratrix of the estate of Frank Swindell, her deceased husband, sued the Chicago, Burlington & Quincy Railway Company (hereinafter called the Railway Company) in the district court of Lancaster county for damages for negligently causing the death of her intestate husband. The Railway Company had a verdict and

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argued here by counsel for the plaintiff in error, that the Railway Company's servants, after they discovered that Swindell was upon the track in front of the approaching train, could, by the exercise of proper care, have avoided running the train over him. If we consider this argument as one of the grounds of negligence on which this action is based, we then have three things imputed as negligence to the Railway Company which it is alleged contributed to the death of Swindell: The running of the train backwards, the unusual rate of speed of the train; and the failure of the Railway Company, after discovering Swindell's presence on the track in front of the train, to bring it to a stop before it struck him. There was evidence before the jury that at the time the Railway Company put on these special trains between the fair grounds and its station it stationed a flagman or watchman at each of the streets crossed by these trains and kept these flagmen or watchmen there on duty while the trains were running; that Swindell was seen by one of these flagmen walking on the track between the rails on the day he was killed and told not to walk there as it was not safe; that the conductor of the train which struck Swindell at the time was standing on the platform of the rear car of the train backing towards the station; that he had his hand upon the lever used for applying the air brakes; that he saw Swindell walking by the side of the track going towards the station; that Swindell, without looking around, stepped on the track when the train was within some fifty feet of him; that the conductor applied the air and called to Swindell, but that the latter paid no attention to him; that the train was stopped as soon thereafter as possible. If the jury predicated its verdict upon findings that the Railway Company, in running its train backwards and at the speed at which it was running, was not by either of said acts guilty of negligence which caused or contributed to the death of Swindell, the evidence supports that finding. Assuming for the purposes of this case that the running of

the train backwards was some evidence of negligence, and that the evidence introduced on behalf of the administratrix that the train at the time it struck Swindell was running at a speed of twenty-five miles an hour was also evidence of negligence on the part of the Railway Company, still the jury had before it the evidence as to the precautions taken by the Railway Company in placing flagmen at each of the street crossings over which these trains passed, and that the conductor was on the rear platform of the coach next to the station towards which the train was backing at the time the accident occurred, and the other evidence as to the speed of the train. This evidence and these circumstances were sufficient to authorize the jury to find that, the time, the place, the circumstances, and all the conditions under which this train was being operated considered, the running of the train backwards and the running it at the rate of speed it was running was not negligence on the part of the Railway Company. There is some conflict in the evidence as to how far Swindell was from the end of the coach which struck him at the time he was discovered by the conductor standing on the platform of that coach. Some of the evidence is that Swindell stepped on the track in front of the coach approaching him when fifty feet from it. There is also evidence that he stepped on the track not more than twenty feet from the train. There is some conflict in the evidence as to whether the train was brought to a stop in as short a time as could have been done by the exercise of proper care. It was for the jury to say from all the evidence in the case whether the Railway Company, after it discovered Swindell on this track in front of the approaching train, made use of all proper efforts to stop the train and avoid the injury. The jury has found by its verdict that the Railway Company was guilty of no negligence in this respect, and the evidence sustains this finding. There is in this case no claim that Swindell was on the track before he was seen by the men in charge of the train;

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in other words, it is not claimed that the Railway Company's employes were guilty of negligence in not keeping a proper lookout and in not discovering Swindell's presence on the track before they did. There seems to be no doubt whatever from the evidence in the record that Swindell was walking from the fair grounds towards the station, was walking by the side of the track, was seen walking there by the conductor who stood on the rear platform of the rear car of the train, and was seen by the conductor on the track between the rails. The question litigated here, like the one involved in all other cases of this character, was: By whose fault or neglect did Swindell lose his life? The jury by its verdict has said at least that the death of this man was not the result of the negligence of the Railway Company, and this finding is supported by sufficient competent evidence.

Complaint is made by counsel for plaintiff in error because the court refused to give a number of instructions requested by them. We have carefully examined all these instructions, and the instructions given by the court, and we find that the court in its charge to the jury gave the substance of all the instructions requested by the plaintiff in error to which she was entitled. Some criticisms are also made by counsel for plaintiff in error upon the instructions given by the court on its own motion. After a careful study of the evidence in this case we have reached the conclusion that the plaintiff in error was not prejudiced by any instruction given by the trial court. Indeed, the charge of the learned judge is a clear and comprehensive statement of the law applicable to the facts in this case. There is no error in the record and the judgment of the district court is

AFFIRMED.

CARRIE WILL V. WILLIAM A. ELWOOD, SHERIFF.

FILED APRIL 16, 1895. No. 6399.

Review: SUFFICIENCY OF EVIDENCE. There is no question of law involved in this case. The evidence examined, and *held* to support the finding of the jury; and the judgment of the district court pronounced thereon is affirmed.

ERROR from the district court of Antelope county. Tried below before ALLEN, J.

O. A. Williams, for plaintiff in error.

M. B. Putney, *contra*.

RAGAN, C.

W. A. Elwood, the sheriff of Antelope county, had in his possession certain executions issued on judgments rendered against one Frederick Will, which executions he levied upon certain personal property and sold the same and applied the proceeds towards the satisfaction of said judgments. Ferdinand Will, the minor son of Frederick Will, by his next friend, Carrie Will, brought this action in the district court of said county against Elwood to recover the value of the property seized by the latter on said executions, claiming that he, Ferdinand Will, was at the time of the seizure of said property the owner thereof. There was a trial to a jury with a verdict in favor of the sheriff, and Carrie Will, as next friend of Ferdinand Will, has prosecuted to this court a petition in error.

The issue litigated before the jury was whether the property seized by the sheriff at the time of its seizure belonged to Frederick Will, the defendant in execution, or to the plaintiff here, Ferdinand Will. The evidence sustains the finding made by the jury. A careful examination of

stroyed, the measure of damages is the difference between the value of the chattels immediately before the injury and immediately thereafter.

6. ———: ———: ———. One whose chattels are injured by the negligence of another cannot, by voluntarily abandoning what remains, charge that other with the total value of the chattels; and where there was evidence tending to show that the destruction was not total and that the plaintiff had so voluntarily abandoned what remained, it was error to instruct the jury that the measure of damages was the market value of the chattels before the injury.

ERROR from the district court of Hamilton county.
Tried below before WHEELER, J.

The facts are stated by the commissioner.

A. W. Agee, for plaintiff in error:

The signals required by statute to be given when a train is approaching a public street or highway is exclusively for the benefit of persons traveling along such street or highway, and about to cross the railroad at the highway crossing. (*Clark v. Missouri P. R. Co.*, 11 Pac. Rep. [Kan.], 134; *Illinois C. R. Co. v. Phelps*, 29 Ill., 447; *Bell v. Hannibal & St. J. R. Co.*, 72 Mo., 50; *Hodges v. St. Louis, K. C. & N. R. Co.*, 71 Mo., 50; *Holmes v. Central Railroad & Banking Co.*, 37 Ga., 593; *Randall v. Baltimore & O. R. Co.*, 109 U. S., 478; *Rosenberger v. Grand Trunk R. Co.*, 8 Ont. App., 482; *East Tennessee, V. & G. R. Co. v. Feathers*, 10 Lea [Tenn.], 103; *St. Louis & S. F. R. Co. v. Payne*, 29 Kan., 166; *Cordell v. New York C. & H. R. R. Co.*, 64 N. Y., 535; *Byrne v. New York C. & H. R. R. Co.*, 94 N. Y., 12; *Alabama G. S. R. Co. v. Hawk*, 72 Ala., 112; *Harty v. Central Railroad Company of New Jersey*, 42 N. Y., 471; *People v. New York C. R. Co.*, 25 Barb. [N. Y.], 199; *Elwood v. New York C. & H. R. R. Co.*, 4 Hun [N. Y.], 808; *Philadelphia & R. R. Co. v. Spearen*, 47 Pa. St., 300; *O'Donnell v. Providence & W. R. Co.*, 6

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R. I., 211; *Chicago, R. I. & P. R. Co. v. Houston*, 95 U. S., 697.)

The seventh and eighth instructions are erroneous. (*St. Louis & S. F. R. Co. v. Payne*, 29 Kan., 166; *Byrne v. New York C. R. Co.*, 104 N. Y., 362; *Harrison v. North Eastern R. Co.*, 29 L. T., n. s. [Eng.], 844; *Sutton v. New York C. & H. R. R. Co.*, 66 N. Y., 243; *Nicholson v. Erie R. Co.*, 41 N. Y., 526; *Hodges v. St. Louis, K. C. & N. R. Co.*, 71 Mo., 50; *Bauer v. Kansas P. R. Co.*, 69 Mo., 219; *Wabash, St. L. & P. R. Co. v. Neikirk*, 15 Brad. [Ill.], 172; *Bennett v. Grand Trunk R. Co.*, 13 Am. & Eng. R. Cas. [Can.], 627; *Thomas v. Delaware, L. & W. R. Co.*, 8 Fed. Rep., 728; *Hill v. Portland & R. R. Co.*, 55 Me., 438; *Johnson's Administrator v. Louisville & N. R. Co.*, 13 Am. & Eng. R. Cas. [Ky.], 623; *Cordell v. New York C. & H. R. R. Co.*, 6 Hun [N. Y.], 461; *Paducah & M. R. Co. v. Hoehl*, 12 Bush [Ky.], 41; *Bauer v. Kansas P. R. Co.*, 69 Mo., 219; *Hickey v. Boston & L. R. Co.*, 14 Allen [Mass.], 432; *Smith v. Savannah & F. W. R. Co.*, 11 S. E. Rep. [Ga.], 455; *Ely v. City of Des Moines*, 52 N. W. Rep. [Ia.], 475; *Pittsburg S. R. Co. v. Taylor*, 104 Pa. St., 306; *City of Erie v. Magill*, 101 Pa. St., 623; *Fleming v. City of Lock Haven*, 15 W. N. C. [Pa.], 216; *Carey v. Chicago, M. & St. P. R. Co.*, 61 Wis., 71; *Courson v. Milwaukee & St. P. R. Co.*, 32 N. W. Rep. [Ia.], 8; *Chicago, R. I. & P. R. Co. v. Houston*, 95 U. S., 697; *Miner v. Connecticut River R. Co.*, 26 N. E. Rep. [Mass.], 994; *Gonzales v. New York & H. R. Co.*, 38 N. Y., 440.)

The evidence does not support the verdict, because the only allegation of negligence which it is claimed contributed to the injury is that the signals required by statute to be given at public crossings were not given, and this allegation is not supported by the evidence. (*Fleming v. City of Lock Haven*, 15 W. N. C. [Pa.], 216; *Chicago & A. R. Co. v. Gretzner*, 46 Ill., 74; *Chicago, B. & Q. R. Co. v. Dickson*, 88 Ill., 431; *Chicago, B. & Q. R. Co. v. Stumps*,

55 Ill., 367; *Frizell v. Cole*, 42 Ill., 362; *Wabash, St. L. & P. R. Co. v. Hicks*, 13 Brad. [Ill.], 407; *Chicago & A. R. Co. v. Robinson*, 106 Ill., 142; *Seibert v. Erie R. Co.*, 49 Barb. [N. Y.], 583; *Chicago & R. I. R. Co. v. Still*, 19 Ill., 500; *Cleveland v. Chicago & N. W. R. Co.*, 35 Ia., 220; *Merz v. Missouri P. R. Co.*, 14 Mo. App., 459; *Evans v. St. Louis & S. F. R. Co.*, 17 Mo. App., 624; *Hanlon v. South Boston H. R. Co.*, 129 Mass., 310; *St. Louis & S. F. R. Co. v. Payne*, 29 Kan., 166; *Chicago & N. W. R. Co. v. Clark*, 2 Brad. [Ill.], 116; *Goldstein v. Chicago, M. & St. P. R. Co.*, 1 N. W. Rep. [Wis.], 37; *Whitney v. Maine C. R. Co.*, 69 Me., 208; *Deville v. Southern P. R. Co.*, 50 Cal., 383; *Baltimore & O. R. Co. v. Whitacre*, 35 O. St., 627; *Carroll v. Minnesota Valley R. Co.*, 13 Minn., 30; *Shearman & Redfield, Negligence*, 281, and note 1; *Rothe v. Milwaukee & St. P. R. Co.*, 21 Wis., 256; *Lake Shore & M. S. R. Co. v. Miller*, 25 Mich., 274; *Hickey v. Boston & L. R. Co.*, 14 Allen [Mass.], 429.)

Marquett & Dewese, also for plaintiff in error.

Whitmore & Carr, contra, in their argument upon the legal duty or obligation of the company to the defendant in error, cited the following cases: *Sweeney v. Old Colony & N. R. Co.*, 10 Allen [Mass.], 368; *Chicago & N. W. R. Co. v. Dunleavy*, 129 Ill., 132; *Texas & P. R. Co. v. Best*, 66 Tex., 116; *McKone v. Michigan C. R. Co.*, 51 Mich., 601; *Davis v. Chicago & N. W. R. Co.*, 58 Wis., 646; *Virginia M. R. Co. v. White*, 84 Va., 498; *Barry v. New York C. & H. R. R. Co.*, 92 N. Y., 289; *Erickson v. St. Paul & D. R. Co.*, 43 N. W. Rep. [Minn.], 332; *Lonerghren v. Illinois C. R. Co.*, 49 N. W. Rep. [Ia.], 852; *New York, L. E. & W. R. Co. v. Leamon*, 15 L. R. A. [N. J.], 426; *Chicago, B. & Q. R. Co. v. Daugherty*, 110 Ill., 521; *Grippen v. New York C. R. Co.*, 40 N. Y., 34; *South & North Alabama R. Co. v. Thompson*, 62 Ala.,

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499; *Finklestein v. New York C. & H. R. R. Co.*, 41 Hun [N. Y.], 34; *Shaber v. St. Paul, M. & M. R. Co.*, 28 Minn., 107; *Macon & W. R. Co. v. Davis*, 18 Ga., 686; *Norton v. Eastern R. Co.*, 113 Mass., 366; *Dyson v. New York & N. E. R. Co.*, 57 Conn., 23; *Union P. R. Co. v. Rasmussen*, 25 Neb., 810; *Omaha, N. & B. H. R. Co. v. O'Donnell*, 22 Neb., 475.

As to the rate of speed of the train and the failure to ring the bell the following authorities were cited: *Rockford, R. I. & St. L. R. Co. v. Hillmer*, 72 Ill., 935; *Chicago, B. & Q. R. Co. v. Cauffman*, 38 Ill., 425; *City of Plattsmouth v. Mitchell*, 20 Neb., 228; *Stevens v. Howe*, 28 Neb., 547; *American Water-Works Co. v. Dougherty*, 37 Neb., 373; *McKean v. Burlington, C. R. & N. R. Co.*, 55 Ia., 194; *Knowles v. Mulder*, 74 Mich., 202.

E. J. Hainer, also for defendant in error:

To persons who are lawfully upon the grounds of the company engaged in necessary business the company owes a duty of active vigilance. (*Haley v. New York C. & H. R. R. Co.*, 7 Hun [N. Y.], 84; *Barton v. New York C. & H. R. R. Co.*, 56 N. Y., 660; *Goodfellow v. Boston, H. & E. R. Co.*, 106 Mass., 461; *Schultz v. Chicago & N. W. R. Co.*, 44 Wis., 638; *Newson v. New York C. & H. R. R. Co.*, 29 N. Y., 383; *Emery v. Minneapolis Industrial Exposition*, 57 N. W. Rep. [Minn.], 1132; *Union P. R. Co. v. Sue*, 25 Neb., 772; *Cassida v. Oregon R. & N. Co.*, 14 Ore., 551; *McKimble v. Boston & M. R. Co.*, 139 Mass., 542; *Texas P. R. Co. v. Brown*, 78 Tex., 397; *Collins v. Toledo, A. A. & N. M. R. Co.*, 80 Mich., 390.)

The statutory requirement for signals at the crossings applies to persons whose property is lawfully on the highways or grounds of the company. (*Cosgrove v. New York C. & H. R. R. Co.*, 87 N. Y., 88; *Rosenberger v. Grand Trunk R. Co.*, 8 Ont. App. [Can.], 482; *Ransom v. Chicago, St. P., M. & O. R. Co.*, 62 Wis., 178.)

The omission to give the signals at crossing was negligence. (*Wakefield v. Connecticut & P. R. R. Co.*, 37 Vt., 330; *Hart v. Chicago, R. I. & P. R. Co.*, 56 Ia., 166; *Western & A. R. Co. v. Jones*, 65 Ga., 631; *Lonergren v. Illinois C. R. Co.*, 49 N. W. Rep. [Ia.], 852.)

IRVINE, C.

Metcalf sued the railroad company to recover damages for injuries done to a team of mules, a wagon, and set of harness which had been struck by a train of the company near the station at Hampton. There was a verdict and judgment for the plaintiff for \$365.42, to reverse which the railroad company prosecutes error.

The evidence upon which the verdict is evidently based tends to show that at Hampton the plaintiff in error's railroad passes through the village in an easterly and westerly course, nearly all of the inhabited portion of the village lying north of the tracks. There is a side track, with switches at either end, lying north of the main line. The station is situated between the main line and the side track at a point not far from the west switch. Two highways cross the tracks, one being Third street, or, as the witnesses designate it, Main street, about 275 feet east of the depot. The other, a section line road at the east boundary line of the village, about 1,000 feet from the depot. In addition to these crossings there are two others, one immediately east and one immediately west of the depot platforms. These crossings are not on public highways, but were placed by or at least with the consent of the railroad company for the purpose of affording access to its depot and platforms. The main line, the side track, and the depot platform outline a triangle west of the depot, and one of the crossings referred to affords an entrance to the space thus inclosed. The primary object of this crossing was to afford access for teams to the west platform. In unloading and loading cars standing on the side track to the west of the depot it

is practicable either to drive a wagon north of the side track close to the cars or south of the side track by means of this crossing into the triangular space referred to. Metcalf owned a mill situated some distance south of the tracks. His manager had been notified that a car load of coal consigned to him had arrived, and a servant named Dixon was instructed to take the mules and wagon and unload this coal. The car stood upon the siding a short distance west of the depot. Dixon drove over the Main street crossing to the north side of the car and from that side took one wagon load of coal. Returning for the second load he testifies that he found the Main street crossing blocked by cars and therefore drove by the depot, and over what we have called the west crossing, into the triangular space, and approached the car from the south side. He applied the brake to the wagon, wrapped the lines around the brake handle, and, mounting the car, was engaged in shoveling coal into the wagon when a freight train approached from the east frightening the mules, which ran towards the crossing and were there struck by the train. One mule was killed, the other severely injured, and the harness and wagon were torn to pieces. The negligence alleged is that the train was behind its schedule time, that it was running at a dangerous rate of speed, and that no signals were given by bell or whistle of the approach of the train.

Of the errors assigned it will be necessary to consider only those relating to the instructions. Complaint is made of the refusal of each of the instructions numbered 4, 5, 6, 7, 10, and 11 asked by the defendant. Of these the refusal of the tenth is the only assignment noticed in the briefs, and the others must, therefore, be deemed waived. The record does not contain any instruction numbered 10, so that we are unable to consider whether or not its refusal was erroneous. The seventh instruction given by the court is as follows:

“No. 7. The jury are instructed that if the evidence

shows that the crossings immediately east and west of the depot at Hampton, were placed there by the railroad company for the use of persons having business at or about the depot in either loading or unloading cars, and such crossings were in fact so used generally, then it was the duty of the person in charge of the engine in question to sound the signal provided by law, precisely the same as for any other crossings, and as elsewhere explained in these instructions."

Section 104, chapter 16, Compiled Statutes, is as follows: "Sec. 104. A bell of at least thirty pounds weight, or a steam whistle, shall be placed on each locomotive engine, and shall be rung or whistled at the distance of at least eighty rods from the place where the said railroad shall cross any other road or street, and be kept ringing or whistling until it shall have crossed said road or street, under penalty of fifty dollars for every neglect, to be paid by the corporation owning the railroad, one-half thereof to go to the informer and the other half to this state, and also be liable for all damages which shall be sustained by any person by reason of such neglect." It is argued that a proper construction of this section limits its application to public highways, and that the crossing where the accident occurred is not within the purview of the law, and that the instruction was, therefore, erroneous. We do not think the statute should be given so narrow an application. Some courts have held that such a statute is in derogation of the common law, and, therefore, the subject of strict construction, but we think in most of the cases where such statutes have been confined in their application to public highways, the language of the statute was such as to evidently call for such restriction. The object of the law was plainly to afford ample warning to persons near the railroad at points where they might lawfully cross, and where they were probably about to cross as trains approached. These crossings were expressly designed to afford access

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to the depot of the railroad company, and the exigency for warnings was probably as great there as at highway crossings on the prairie. Therefore, we think that when the court instructed the jury that the duty to sound signals applied to this crossing, provided the jury should find that the crossings were placed there by the railroad company for the use of persons having business about the depot; and that such crossings were in fact so used generally, the law was stated as favorably to the railroad company as could be required. The language of the statute is, "where the said railroad shall cross any other road or street," and we hold that it applies as well to roads in fact used by the public, though not legally dedicated to public use, as to those so dedicated. The instruction was, therefore, correct.

The eighth instruction is as follows:

"No. 8. The court instructs the jury that by the laws of this state, every railroad company is required to have a bell of at least thirty pounds weight, and a steam whistle, placed and kept on each locomotive engine, which shall be rung or whistled at the distance of at least eighty rods from the place where the said railroad shall cross any other road or street, and be kept ringing or whistling until it shall have passed said road or street, and that the company shall be liable for all damages resulting by reason of a neglect to comply with such law. Now if the jury believe from the evidence that the persons in charge of the engine in question omitted to sound a whistle or ring a bell continuously for the distance of eighty rods before reaching the crossing at which the team in question was struck, and you further believe from the evidence that the team was struck as charged in the petition in consequence of the omission to ring the bell or sound the whistle while the person in charge of the team was in the exercise of all reasonable care and caution in the matter, then the defendant railroad company is liable to the plaintiff for the loss and damage sustained by him by reason of such injury, if any such has been proven."

It will be observed that this instruction charges the railroad company with the same duty toward the plaintiff as if the plaintiff's team, as the train approached, had been approaching the crossing with the intention of using the same, and the criticisms made upon the instruction raise the following questions: First—Does the statute impose any duty upon the railroad company except in favor of those on the road and about to cross the tracks? Second—If any duty is imposed in favor of others, does a violation of the statute as to such persons merely afford evidence of negligence, or does it constitute negligence as a matter of law, provided the injury be the proximate result of the violation of the statute?

On the first question suggested the authorities may be grouped in three classes. It has been sometimes held that the object of such a statute is solely to warn persons on a highway approaching and about to cross the tracks, and that, therefore, where the injury was sustained by any other person the failure to obey the statute was no evidence of negligence. Among the cases so holding are: *St. Louis & S. F. R. Co. v. Payne*, 29 Kan., 166; *Missouri P. R. Co. v. Pierce*, 33 Kan., 61; *Neeley v. Charlotte, C. & A. R. Co.*, 33 S. Car., 136; *O'Donnell v. Providence & W. R. Co.*, 6 R. I., 211. The case of *St. Louis & S. F. R. Co. v. Payne*, *supra*, was one very similar to this in its facts. It may here be observed that, in many cases where the rule has been stated in language similar to the above, the injury was suffered by someone on the tracks at a place other than a lawful crossing, and the language was not used to distinguish between persons about to cross and persons lawfully on the highway at or near the crossing, but not intending to cross. This distinction seems to have presented itself to Judge Brewer in *St. Louis & S. F. R. Co. v. Payne*, and he says that he concurred solely upon the ground that the plaintiff was not upon the highway. In another class of cases it is said that where the injury was

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suffered by someone crossing or attempting to cross on the highway, the violation of the statute is negligence in law, but where the injury is to another person claiming to be so situated that he had a right to rely on the giving of the signals, the failure to give them is evidence of negligence, to be submitted to the jury with the other facts in the case. Among such cases are *Maney v. Chicago, B. & Q. R. Co.*, 49 Ill. App., 105; *Western & A. R. Co. v. Jones*, 65 Ga., 631. In the third class of cases it is held that the object of the statute is not solely to protect persons intending to cross the track from collisions, but that its object is to protect all persons lawfully at or near the crossing from any danger naturally to be apprehended from the sudden approach without warning of a train at such a place. *Harty v. Central Railroad Co. of New Jersey*, 42 N. Y., 468, is a case usually cited in support of the rule announced in the first group of cases above cited; but an inspection of the case convinces us that the case really belongs in the last class. In that case the injury was sustained by a person walking upon the track at some distance from the crossing, and it was held that the statute did not protect such person; but the language of Allen, J., in *People v. New York C. R. Co.*, 25 Barb. [N. Y.], 199, was quoted with approval as follows: "The hazards to be provided against were twofold: (1) the danger of actual collision at the crossing; and (2) that of damage by the frightening of teams traveling upon the public highway near the crossing." In *Ransom v. Chicago, St. P., M. & O. R. Co.*, 62 Wis., 178, it was held that the statute was intended to guard against the danger of injury to teams traveling upon the highway near the crossing as well as the danger of actual collision at the crossing, and that a railroad company was, therefore, liable for injuries caused by a failure to obey the statute to persons traveling on a highway parallel with the railroad and not intending to cross the track. In *Lonergren v. Illinois C. R. Co.*, 49 N. W.

Rep. [Ia.], 852, the facts were similar to those in the case before us, and the court held that the plaintiff was within the protection of the statute. A rehearing was allowed and the first decision adhered to. (52 N. W. Rep., 236.) In the opinion on rehearing the court reviews the authorities at length, and to our mind conclusively demonstrates that the rule illustrated by the third class of cases is correct. The plaintiff was lawfully upon the company's land, having reached it by a means provided for the purpose. Whether or not he exercised due care in going where he did, in the care of his team and in watching for trains, was submitted to the jury and found in favor of the plaintiff. He claims that his driver had a right to rely on the giving of the statutory signals, and that had the company given them the driver would have been warned of the approach of the train in sufficient time to protect the mules from fright. Whether or not any signals were given is a question upon which the evidence was conflicting. We think that so far as the first question is concerned the instruction stated the law correctly and was applicable to the evidence.

The second question presented by the instruction under consideration is also one upon which courts in different states have reached different conclusions. In some states it is held that the violation of a statute or ordinance is negligence in law, while in others it is held that it is merely evidence of negligence. We think a consideration of the decisions of this court compels a solution of the question here without regard to authorities elsewhere. In the *City of Lincoln v. Gillilan*, 18 Neb., 114, it was held that even where the facts are undisputed, if upon such facts different minds may honestly draw different conclusions as to whether or not such facts establish negligence or the absence thereof, the question as to the conclusion to be arrived at is for the jury and not for the court. The rule there laid down, stated in those words, stated in equivalent language, or assumed without definite statement, has formed

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the basis of all decisions in negligence cases, at least since the decision cited. Among the more recent cases following this rule may be cited: *Chicago, B. & Q. R. Co. v. Laudauer*, 36 Neb., 642, 39 Neb., 803; *American Water-Works Co. v. Dougherty*, 37 Neb., 373; *Missouri P. R. Co. Baier*, 37 Neb., 235; *Omaha Street R. Co. v. Craig*, 39 Neb., 601; *Omaha & R. V. R. Co. v. Brady*, 39 Neb., 27; *Omaha & R. V. R. Co. v. Morgan*, 40 Neb., 604; *Chicago, B. & Q. R. Co. v. Wymore*, 40 Neb., 645; *Chicago, B. & Q. R. Co. v. Wilgus*, 40 Neb., 660; *Chicago, B. & Q. R. Co. v. Oleson*, 40 Neb., 889; *Union P. R. Co. v. Erickson*, 41 Neb., 1. In several cases it has been said that it was improper to state to the jury a circumstance or group of facts and instruct that such facts or group of facts amounts to negligence *per se*. (*Missouri P. R. Co. v. Baier, supra*; *Omaha & R. V. R. Co. v. Morgan, supra*.) This rule, so well settled and so generally adhered to, should not be departed from without sound and conclusive reasons for the exception. It is everywhere agreed that a jury may infer negligence from the single fact of the violation of a statute, providing the injury was the direct result of such violation; therefore, where the violation of a statute is shown, and where from that fact and from the other facts in evidence there can be no ground for a reasonable difference of opinion as to the negligence of the defendant, it might be proper to give such an instruction as the one we are considering, but we do not know that the obligation of a statute is any greater than that of the unwritten law, and all negligence must consist in the disregard of one or the other. We cannot see that any distinction in kind arises between a case where the defendant has violated a statutory obligation and one where he has violated the common law obligation to conduct himself for the safety of others in such a manner as one of ordinary prudence would conduct himself under similar circumstances. We see no reason for carving out an exception to the general rule of negligence in

such a case as this, and the current of decisions of this court compels a result in accordance with that reached by adopting a general rule. In *Omaha, N. & B. H. R. Co. v. O'Donnell*, 22 Neb., 475, the negligence alleged was, as here, the failure to give the statutory signal for a crossing while running at a high rate of speed and behind schedule time. The rule was there stated in the syllabus to be that such facts were to be considered in deciding whether the company was guilty of negligence, and the opinion uses this language: "If it be true that the train was running at the rate of speed described by the witnesses through the village, and that no signal of any kind was given,—the train being one hour and a half later than its usual and regular time,—these facts would be proper to be considered by the jury in ascertaining whether the employes of plaintiff in error were negligent or not, the law requiring the signals to be given." This would seem to be a clear declaration that the violation of the ordinance, while sufficient evidence of negligence, is not conclusive and does not amount even to a presumption of law. An instruction to the same effect was quoted with approval in *Omaha Street R. Co. v. Loehneisen*, 40 Neb., 37. And in *Omaha Street R. Co. v. Duvall*, 40 Neb., 29, in discussing an ordinance limiting the speed of street cars, the court said: "If, therefore, the privilege granted is exercised in a manner forbidden by ordinances enacted for the safety of the general public and injuries result, these facts afford reasonable grounds for inferring negligence prejudicial to the rights of those in whose interests and for whose protection such municipal regulations were adopted. These principles were embodied in instruction No. 1, requested by plaintiff, and that instruction was, therefore, properly given." We are aware that in *Union P. R. Co. v. Rasmussen*, 25 Neb., 810, an instruction to the effect that where a railroad company runs its trains through a city at a greater rate of speed than the ordinance permits, negligence will

be presumed, was held correct; but in the opinion in that case it was said: "If the train was greatly exceeding the fixed rate, this was competent for the jury to consider as tending to prove negligence;" and in the syllabus the doctrine of the case was stated to be that the ordinance of the city limiting the speed of trains to six miles an hour within the corporate limits is proper evidence to go to the jury on the question of negligence, and that a failure to discharge the duty imposed by ordinance may be considered by the jury in determining whether the railroad company was guilty of negligence. In view of the general and well established rule, and in view of the other cases on the subject, and also in view of the fact that the opinion in *Omaha, N. & B. H. R. Co. v. O'Donnell*, *supra*, was written by the same judge who wrote the opinion in *Union P. R. Co. v. Rasmussen*, we must conclude that the last cited case does not correctly state the law, in so far as it approves the instruction to the effect that a violation of the ordinance would raise a presumption of negligence. We conclude, therefore, that the district court erred in stating to the jury that the railroad company was liable as a matter of law, if the injury resulted from a failure to sound the signals, and that the court should not have gone further than to have instructed the jury that they might infer negligence from that fact.

As to the measure of damages, the court instructed the jury that if they found for the plaintiff, his damages should be assessed "in the reasonable market value of the property at the time either destroyed or injured, and afterwards taken into its possession by the defendant company," together with interest. This instruction assumed a state of facts not borne out by the evidence. The plaintiff's manager refused to take away the living mule and the remnants of the harness and wagon, whereupon the station agent caused the mule to be cared for, and the two collars, which seem to have been the only portion of the harness left in-

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tact, to be stored at a livery stable. The plaintiff afterwards obtained these collars. The plain inference from the evidence is that the retention of the mule by the railroad company was due solely to the plaintiff's refusal to receive it into his possession. Had the proof shown that the property was entirely destroyed, or had it shown without contradiction that the railroad company converted what was not destroyed to its own use, the instruction would have been correct. But it has often been decided that one who has been injured by the negligence of another must exercise reasonable precautions to render the injury as light as possible, and that he cannot recover for increased damages due to his own negligence. The company cannot be charged as for a total destruction of the property merely because the plaintiff elected not to retain such portion as was not destroyed. The measure of damages under the evidence in this case was the difference between the value of the property immediately before its injury and its value thereafter.

REVERSED AND REMANDED.

**KILPATRICK-KOCH DRY GOODS COMPANY V. HENRY
J. BREMERS ET AL.**

FILED APRIL 16, 1895. No. 6128.

- 1. Estoppel: ATTACHMENT: PLEADING.** An attachment having been issued against a defendant, the plaintiff claiming to have acquired a lien by virtue of a garnishment founded upon averments that the garnishee had property of the defendant in his possession, cannot be heard to insist that the defendant is without standing to move a discharge of the attachment because in fact he had no interest in the property.
- 2. Chattel Mortgages: CONSTRUCTION: VOLUNTARY ASSIGNMENTS.** Instruments in the form of chattel mortgages will not be held to constitute an attempted assignment for the benefit of

44	863
45	141
45	797
44	863
48	56
44	863
49	260
49	637
51	250
44	863
58	518
58	717
44	863
59	19
44	863
57	452

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creditors because of the contemplated reciprocal trusts imposed on each mortgagee in favor of the others; because the mortgages provide that they shall prorate one with another; because at the time the mortgages were made the mortgagor was unable to redeem, conveyed all his property by the mortgages to secure debts greater than the value of the property; and because the parties contemplated that the mortgagees should take immediate possession,—nor does the fact that the mortgages contained a power of sale in accordance with the statutory provisions for foreclosure render the transaction an assignment.

3. **Voluntary Assignments: CHATTEL MORTGAGES.** The act in regard to voluntary assignments refers only to assignments intended as such; that is, when a debtor undertakes to make an assignment under the statute he must make it in accordance with it, otherwise it is no assignment and is void. But the rules relating to the construction of mortgages and other instruments somewhat akin to assignments, but not intended as such, remain unchanged.

ERROR from the district court of Dodge county. Tried below before MARSHALL, J.

Frick & Dolezal and W. W. Morsman, for plaintiff in error.

Loomis & Abbott and Munger & Courtright, contra.

See opinion for citations.

IRVINE, C.

The plaintiff in error brought this action against Henry J. Bremers to recover \$2,742.86 for goods sold and delivered. An attachment was issued on an affidavit assigning several grounds, the only one which any attempt was made to support being that the defendant had assigned and disposed of his property with intent to defraud his creditors. No property was seized under the writ, but process of garnishment was served on the First National Bank of Fremont, J. H. Meyer, and upon persons alleged to be agents of Joel J. Bailey & Co., and Kirkendall, Jones &

Co. The First National Bank and Meyer answered as garnishees. The defendant Bremers moved to discharge the attachment, the plaintiff moved for an order requiring the garnishees to pay the amount of plaintiff's claim into court. The district court overruled the latter motion and discharged the attachment. Judgment was entered in favor of plaintiff against Bremers, and the plaintiff instituted proceedings in error against Bremers, the First National Bank, and Meyer, seeking to reverse the two orders referred to.

The evidence showed that Bremers, who was engaged in trade at Fremont, was on the 21st of January, 1893, indebted as follows: To J. H. Meyer, \$3,425; to the First National Bank, \$1,497.62; to Kirkendall, Jones & Co., \$333.03; to Joel J. Bailey & Co., \$1,174.27; to Kilpatrick-Koch Dry Goods Company, \$2,742.86. The indebtedness to the first two was for borrowed money; to the last three for goods sold and delivered. He was possessed of a stock of goods which was valued by persons who took an inventory thereafter at \$8,000. Bremers testifies that it was worth not more than \$6,500. Meyer was pressing him for payment or security. He agreed to give this security, but desired to protect other creditors at the same time, giving a preference to those whose demands arose from the loan of money. Accordingly, five chattel mortgages were executed by Bremers, one to each of the creditors. The mortgage to Meyer was made to secure a note dated January 21, 1893, and due one day after date; that to the bank secured three notes, two of which were already held by the bank and were not yet due; and the third was given for an overdraft and was payable one day after date. Each of these mortgages contained a provision that it was to prorate with the others. The three mortgages to wholesale dealers were each made to secure notes dated one day after date. Each provided that it should be subject to the mortgages to Meyer and to the bank, but that the three

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junior mortgages should prorate with one another. These mortgages were in the usual form and contained a power to sell at public auction after twenty days' notice. The mortgages were all upon Bremers' stock of goods, together with the furniture and fixtures, but that to Meyer excepted from the goods mortgaged "boots, shoes, slippers, and rubber goods." The three junior mortgages were made without the solicitation or knowledge of the mortgagees. Bailey & Co. and Kirkendall, Jones & Co. seem to have accepted their mortgages, but the plaintiff refused to accept its, and began this action. Before the motion was filed to discharge the attachment the goods were sold in bulk by the two senior mortgagees, realizing \$5,277.50. This was sufficient to satisfy the two senior mortgages and the cost of keeping and selling the property and left a small balance which an attorney retained for the benefit of the junior mortgagees. Possession had been taken by the senior mortgagees the evening the mortgages were executed and was retained by them until the sale.

The plaintiff in error contends that Bremers had no standing in court to move for the discharge of the attachment and that the judgment should be for that reason reversed. This contention is based upon the fact that the goods had been sold before the motion was filed and had not realized sufficient to pay the mortgages; that, therefore, no interest was left in Bremers, residuary, contingent, or otherwise. It must be remembered, however, that the plaintiff did not attach these goods. It suffered them to remain in the possession of the mortgagees and contented itself with garnishing the latter. This garnishment was founded upon the allegation that the mortgagees had property of Bremers in their possession. If, therefore, no interest remained in Bremers, then the plaintiff gained nothing by this garnishment. In other words, the plaintiff, relying upon its garnishment to reach the proceeds of the sale of the goods, cannot be heard to urge, contrary

to the jurisdictional facts necessary to support the garnishment, that Bremers was without interest therein. A similar point was passed upon in *Grimes v. Farrington*, 19 Neb., 44, where it was said: "It is next contended that defendants in error have no standing in court which will permit them to question the attachments. That according to their own theory they were not in possession of the goods at the time of the levy and are not entitled to the possession of them. This might perhaps be sufficiently answered by saying that since plaintiffs in error have levied upon the property as the property of defendants in error and insist that it does belong to them, they might not be heard now to say that plaintiffs in error have no such interest in it as would permit them to defend against the attachment." Interesting questions are suggested by the contention referred to as to the right of the plaintiff to attack the validity of the mortgages by virtue of its garnishment, and as to the position the plaintiff would be placed in should it be held that Bremers had no standing to move a discharge of the attachment. These questions are not, however, argued, and we mention them merely in order to affirmatively disclaim the intention of inferentially ruling thereon. On the merits of the motion to dissolve the attachment there is no contention that Bremers, in making the mortgages, was moved by any actual fraudulent intent. There is not the slightest evidence to that effect; but plaintiff bases its contention solely upon the ground that the conveyances, while in the form of mortgages, amounted in fact and in law to an irregular assignment for the benefit of creditors, which not complying with the requirements of the statute, was void. The writer is aware that it is a commonly accepted doctrine that if a debtor makes a conveyance which the law declares void generally or as against creditors, an intent to defraud is presumed and that an attachment will lie. Speaking for himself the writer conceives that a distinction exists between attacking such a conveyance for the purpose

junior mortgages should prorate with one another. These mortgages were in the usual form and contained a power to sell at public auction after twenty days' notice. The mortgages were all upon Bremers' stock of goods, together with the furniture and fixtures, but that to Meyer excepted from the goods mortgaged "boots, shoes, slippers, and rubber goods." The three junior mortgages were made without the solicitation or knowledge of the mortgagees. Bailey & Co. and Kirkendall, Jones & Co. seem to have accepted their mortgages, but the plaintiff refused to accept its, and began this action. Before the motion was filed to discharge the attachment the goods were sold in bulk by the two senior mortgagees, realizing \$5,277.50. This was sufficient to satisfy the two senior mortgages and the cost of keeping and selling the property and left a small balance which an attorney retained for the benefit of the junior mortgagees. Possession had been taken by the senior mortgagees the evening the mortgages were executed and was retained by them until the sale.

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of avoiding it as against the grantee and merely using the fact of the conveyance in evidence in support of an attachment directed against the grantor. To support such an attachment on the ground of a conveyance of property the statute requires that the conveyance must be made with the intent to defraud creditors. (Code Civil Procedure, sec. 198.) And it has been several times said that whether the grantor was actuated by such a fraudulent intent is a question of fact. (*Kilpatrick-Koch Dry Goods Co. v. McPheely*, 37 Neb., 800; *Hewitt v. Commercial Banking Co.* 40 Neb., 820; *Meyer v. Union Bag & Paper Co.*, 41 Neb., 67.) This is certainly true, unless the fraud is disclosed by an inspection of the instrument of conveyance itself. (*Houck v. Heinzman*, 37 Neb., 463.) But it may be remarked that the case last cited was a proceeding in which the validity of the mortgage as between a creditor and a mortgagor was involved, and the issue was not as to the intent of the debtor alone. The foregoing statement is made merely as an expression of the writer's views and for the purpose of preventing an inference to the contrary to be drawn; but the case was not presented upon that ground and the decision will be based on the questions argued.

The real question presented, to-wit, the test to distinguish between mortgages given by way of security and an attempted assignment for the benefit of creditors, is one which has been much discussed in former decisions. The many authorities, which, as counsel for plaintiff say, "are very numerous, very conflicting, and hardly one in ten has been decided upon principle," have been several times reviewed. We shall not here undertake to again review them, nor shall we, except in so far as the special argument advanced in this case requires, renew the discussion of the broad question. Suffice it to say that an uncertainty in the decisions, occasioned by the apparent conflict of *Grimes v. Farrington*, 19 Neb., 44, and the case of *Bonns v. Carter*, 20 Neb., 566, has, we think, been removed by the uniformity

of later decisions, beginning with *Hershiser v. Higman*, 31 Neb., 531. These are all contrary to the logic of the majority opinion in *Bonns v. Carter*. Indeed, *Hamilton v. Isaacs*, 34 Neb., 709, expressly disproves of *Bonns v. Carter*, and *Jones v. Loree*, 37 Neb., 816, and *Smith v. Phelan*, 40 Neb., 765, explicitly announce that *Bonns v. Carter* is overruled. Counsel for the plaintiff, in a fair and very able brief, filed before the decision in *Jones v. Loree*, while basing their argument to some extent on the doctrine announced by the majority in *Bonns v. Carter*, recognize *Hamilton v. Isaacs* as the definitive expression of the court's views, and concede that unless this case is distinguishable from that their position cannot be maintained. In *Hamilton v. Isaacs*, one Denning was in failing circumstances and made separate mortgages upon his stock of merchandise to six creditors. The mortgages were made and delivered at the same time, and they contained a provision that they should prorate with one another. The case was distinguished from *Bonns v. Carter*, upon the ground that the conveyance was not to a trustee for creditors. It was held that the transaction was not void as a prohibited assignment; that the contemplated trust reposed in each mortgagee in favor of the others did not constitute it an assignment, nor did the fact that the mortgagor was insolvent, nor the fact that there was an agreement that the mortgages should prorate. The plaintiff undertakes to distinguish that case from the present upon the grounds, first, that there was not in *Hamilton v. Isaacs* a transfer to one creditor of goods upon which another creditor had no lien, with a provision that the latter should share in the proceeds of such goods; and secondly, that it was assumed in *Hamilton v. Isaacs* that the instruments were made to secure an indebtedness, while in this case it was evidently not the purpose to give security, but that it was the purpose to make an absolute disposition of the property for the benefit of creditors. The plaintiff's first argument is, we think,

based upon a misconstruction of the two senior mortgages. The argument is that the "boots, shoes, slippers, and rubber goods" not included in Meyer's mortgage were by the prorating clause in the bank's mortgage devoted to the payment of Meyer's debt as well as the bank's. We think a proper construction of the mortgages is that Meyer obtained no lien on these excepted goods, and that the stipulation that the two mortgages should prorate applied only to such goods as were included in both mortgages. On the second question the argument is based largely on the language used by Judge Post in the statement of the case of *Hamilton v. Isaacs*, to-wit: "Said mortgages were all given to secure the *bona fide* debts of the mortgagor." But this language was not used in stating a conclusion reached from a consideration of the question as to whether the mortgages were given by way of security or by way of absolute disposition. The court merely made use of the customary phrase by which such transactions are described, and no stress can be laid upon the use of the word "secured." The argument of the plaintiff is, in short, that in making the mortgages in the manner in which they were made, relative or reciprocal trusts were created against each mortgagee in favor of the others; that the mortgagor was insolvent; that the parties did not contemplate that he would redeem the mortgages; that the goods were not worth enough to pay them all; that the mortgagor had not the ability to redeem; that he placed in the mortgages a power of sale with the intention that it should be immediately exercised; that from these facts it was evident that he contemplated an absolute disposition of his property in order that it should be sold and a fund created to pay debts without reserving any interest in himself. Do these facts create any distinction in principle between this case and the cases of *Hershiser v. Higman*, *Hamilton v. Isaacs*, and *Jones v. Loree*? We think not. The fact that the mortgagor was insolvent is not important. An insolv-

ent debtor has the right to prefer one or more of his creditors to the extent, if necessary, of devoting all his property to that purpose. (*Hershiser v. Higman, supra*; *Hamilton v. Isaacs, supra*; *Costello v. Chamberlain*, 36 Neb., 45; *Kilpatrick-Koch Dry Goods Co. v. McPheely, supra*.) So far as the plaintiff's argument is based upon the doctrine that relative trusts were created against each mortgagee on behalf of the others the case is precisely similar to that of *Hamilton v. Isaacs*. So far as the argument is based upon the ground that the defeasance was not inserted in good faith and that the debtor intended the transaction to be an absolute disposition of his property, this must be inferred, if at all, from the facts that the mortgaged property was probably insufficient to pay the debts secured; that the parties contemplated that the mortgagees should immediately take possession and proceed to realize on the security, and from the fact that the mortgagor gave an express power of sale. If we should hold that the taking or giving of inadequate security constituted the transaction fraudulent we would practically hold that a debtor could never safely secure his creditor. The argument has always been the other way, and it has often been said that the giving and taking of security in value greatly in excess of the debt is evidence tending to prove fraud. It would not do to say that because a debtor cannot give adequate security he must refrain from giving any or leave the transaction open to attack as constituting a fraud in law. So, too, of the fact that the parties contemplated that the creditors should immediately take possession and that thereafter the debtor should not continue in business. Our statute makes a chattel mortgage presumptively fraudulent unless the mortgagee does immediately take and continuously retain possession of the mortgaged property. If it is a badge of fraud not to take immediate possession, it cannot be a badge of fraud to do so. As to the power of sale, it was for a sale in the manner provided

Kilpatrick Koch Dry Goods Co. v. Bremers.

by statute for the foreclosure of chattel mortgages. (Compiled Statutes, ch. 12.) If no such provision had been contained in the mortgage, the statute referred to would have supplied it, and we cannot hold that the instruments were not mortgages because they provided for foreclosure in the very manner which the statute requires for the foreclosure of mortgages. We repeat that we can see no distinction in principle between this case and *Hamilton v. Isaacs* and the recent decisions of this court. The rule announced in these later cases is now well settled and must be adhered to. In order that the position of the court may not be misunderstood we take this occasion to say that the result of the later cases is an approval of the views of Judge REESE in the dissenting opinion in *Bonns v. Carter*, 22 Neb., 495, in which this language was used: "I am inclined to think that the statute refers only to assignments when intended as such; that is, when a debtor undertakes to make an assignment under the statute, he must make it in accordance with it, otherwise it is no assignment, and is void; and the rules relating to the construction of mortgages and other instruments somewhat akin to assignments, but not intended as such, remain unchanged; and, therefore, this mortgage is not an assignment, in the sense referred to in the first and twenty-ninth sections of the assignment law, and is not, for that reason, void." It follows that the district court properly discharged the attachment and, therefore, did not err in discharging the garnishees at the same time.

JUDGMENT AFFIRMED.

F. L. BLUMER V. GEORGE A. BENNETT ET AL.

FILED APRIL 16, 1895. No. 6175.

1. **Trial: EXCEPTIONS.** The taking of an exception is the act of parties or counsel in court. The notation of the exception on the record is merely evidence of the fact.
2. **Review: RECORD OF INSTRUCTIONS.** Instructions given and refused are a part of the record and need not be and should not be embodied in a bill of exceptions.
3. **Trial: EXCEPTIONS TO INSTRUCTIONS.** The notation of the words "given" or "refused," as required by statute, on the margin of the instructions, is also a portion of the record, indicating the court's ruling on the instruction, and an exception is properly noted by a memorandum on the margin of the instructions.
4. ———: ———. Where counsel, when instructions were given, indicated in open court their desire to except thereto, and afterwards themselves noted their exceptions by a memorandum on the margin of the instructions, *held*, that the court, in overruling a motion to strike from the record such memorandum, adopted and ratified the notation, and such notation being in accordance with the facts, there was no error in the court's ruling.
5. **Fraudulent Conveyances: BURDEN OF PROOF.** Where the vendee or mortgagee of chattels takes immediate possession and continuously retains possession, in a contest between such vendee or mortgagee and creditors of the vendor or mortgagor the burden of proof is on the creditors to show both a fraudulent intent on the part of the vendor or mortgagor and participation therein on the part of the vendee or mortgagee.

ERROR from the district court of Douglas county. Tried below before SCOTT, J.

Estelle & Hoepfner, for plaintiff in error, cited: *Sloan v. Coburn*, 26 Neb., 607.

W. W. Morsman, *contra*, cited: *Goodrich v. Downs*, 6 Hill [N. Y.], 438; *Barney v. Griffin*, 2 N. Y., 365; *Leitch v. Hollister*, 4 N. Y., 214; *Sukeforth v. Lord*, 25 Pac. Rep.

44	873
52	280
44	873
59	700
44	873
56	815
44	873
61	783

Blumer v. Bennett.

[Cal.], 497; *Brigham v. Jones*, 29 Pac. Rep. [Kan.], 309; *Beels v. Flynn*, 28 Neb., 575; *Hedman v. Anderson*, 6 Neb., 399; *Tallon v. Ellison*, 3 Neb., 75; *Montieth v. Bax*, 4 Neb., 170; *Cleveland Paper Co. v. Banks*, 15 Neb., 20; *Caulwallader v. Blair*, 18 Ia., 420.

IRVINE, C.

The defendants in error have presented a cross-petition in error to reverse an order of the district court overruling their motion to strike from the record notations of exceptions on the margin of the instructions. Inasmuch as most of the assignments in the plaintiff's petition in error relate to the instructions it is necessary to consider and decide upon the questions presented by the cross-petition before reviewing the case on the principal petition in error. The record filed with the cross-petition consists of the motion to strike from the record the notation of exceptions and an order overruling the same without any specific findings. There is also attached, duly settled and authenticated, a bill of exceptions embodying the affidavits used on the hearing of this motion, the judge's certificate to this bill of exceptions containing specific findings of fact and the reasons of the court for overruling the motion. The reasoning of the court is not properly a part of the record in any place, and the special findings, to be available, should be embodied in the record and not in the bill of exceptions. The record filed with the plaintiff's petition in error shows on the margin of each instruction given or refused a notation to the effect that plaintiffs except. After this notation appear, in some instances, the words "Scott, Judge," and from the affidavits filed and used on the hearing of the motion to strike, it appears that immediately after the court charged the jury and refused the instructions which were refused, counsel on both sides arose before the jury had left the box and indicated their desire to take exceptions; that one of plaintiff's attorneys stated that he intended to take

exception to the instructions given and to the refusal to give those by him requested, and that the court remarked that no formal exceptions need be taken at that time, but might be taken any time within three days after the verdict; that counsel acquiesced in that ruling, and very soon after the verdict was returned one of plaintiff's attorneys went to the clerk's office and himself made the notations referred to on the margin of the instructions.

The defendant in error, in support of his cross-petition, argues that the notation of the exceptions by counsel was unauthorized and of no avail; that the instructions should be incorporated in the bill of exceptions and are not part of the record, or, if the instructions themselves are a part of the record, that the exceptions thereto are not and must appear by bill of exceptions and not by the transcript. In order to come to a consideration of these points it is necessary to refer to the statutes. Chapter 19, section 52, Compiled Statutes, makes it the duty of the judges to reduce their charges to writing unless the same be waived in open court "and so entered in the record of said case." Section 53 provides for the modification of instructions requested by the use of such characterizing words as "changed thus," which words shall themselves indicate that the same was refused as demanded." Section 54 requires the court to read the instructions given to the jury, to announce them as given, and to announce as refused all those which are refused and to write the word "given" or "refused," as the case may be, on the margin of each instruction. Section 55 requires all instructions to be filed by the clerk, and provides that "such instructions shall be preserved as part of the record of the cause in which they were given." Section 307 of the Code of Civil Procedure defines an exception as "an objection taken to a decision of the court upon a matter of law." Section 308 requires the party objecting to the decision to except at the time the decision is made. Section 310 provides that where the de-

cision objected to is entered on the record and the grounds of objection appear in the entry, the exception may be taken by the party causing to be noted at the end of the decision that he excepts. In *Eaton v. Carruth*, 11 Neb., 231, it was said that the instructions are properly matters of record in this state and should not be embodied in a bill of exceptions. Practically the same language was used in *Cleveland v. Banks*, 15 Neb., 20. It may be conceded that the expressions in both cases were mere *dicta*; but they have been followed in practice for many years, and having become a rule of practice, should not be departed from without the gravest reasons for so doing. We do not think such reasons exist. On the contrary, we are clearly convinced that the rule announced in those cases is correct. The sections from chapter 19 referred to make it too plain for construction that the instructions on being filed become a part of the record. If so, they need not be, and should not be, embodied in a bill of exceptions, because the office of the bill of exceptions is to bring into the record what otherwise would not there appear. So, too, section 54 of chapter 19 requires the court to write the word "given" or "refused," as the case may be, on the margin of instructions. This is made the more manifest by the provision of section 53, whereby the use of characterizing words in modifying an instruction requested is made equivalent to the use of direct words showing that the instruction as requested was refused. We, therefore, hold that construing these sections the instructions given and refused are a part of the record, and that the marginal notes by the judge indicating his ruling thereon become also a part of the record, as much so as a journal entry embodying a ruling of the court, and that, therefore, neither the instructions nor the action of the court thereon need be, or should be, embraced in the bill of exceptions. Passing on to the requirements of the Code in regard to exceptions, we note, first, that it is not required that in objecting or excepting to a ruling on the instructions

any specific reason need be given. Therefore, the instruction and the decision of the court in giving and refusing it appearing of record, it is sufficient, under section 310, in order to note an exception thereto that the party excepting should cause it to be noted at the end of the decision. We do not think that this section is important so far as it applies to the mere place of notation, but even if the notation must be at the end of the decision and nowhere else, in the case of instructions the end of the decision would be the court's marginal note. The exception is the act of the party at the time of the ruling complained of, the notation is merely the evidence of such action—the exclusive evidence it is true, but still merely evidence and not the main fact. Now it appears from the proof offered that counsel did as much as could be done when the court ruled upon the instructions. Counsel arose and announced their desire to take exceptions, and apparently before they were permitted to make the exceptions specific the court stopped them. The allowance of an exception is not within the discretion of the trial judge. A party is entitled to an exception as a matter of right. The court cannot refuse it, nor can the court by indirection, as by refusing to listen to counsel, deprive a party of the benefit of exception. The trial judge in this case did not undertake to prevent the noting of exceptions. He merely resorted to a practice which the writer knows to be in general use and which has strong points in its favor of delaying the noting of exceptions until after the jury retires. We think counsel must be considered as having done what they stated they desired to do and what they had a right to do at the time the court interposed, and that the notation of the exceptions after the verdict was returned was merely entering of record the evidence of what had been done at the time of the court's rulings. Nor do we think that in this case the fact that the notations were made by counsel was important. The court might have made the notations

at the time counsel stated their exceptions. The court might have made the notations afterwards, or directed the clerk so to do in order that the record might disclose the exceptions which had actually been taken. It was irregular for counsel themselves to make the notation, but inasmuch as the court might have made them or might have directed their making, when the court overruled the motion to strike off these notations it in effect ratified and adopted the act of counsel. The record as it stands now is in this respect in accordance with the facts as disclosed by the bill of exceptions. The court did not err in overruling defendant in error's motion and its action is in that respect affirmed.

We now come to a consideration of the plaintiff's petition in error. The action was one in replevin by Blumer against the sheriff of Douglas county to recover the possession of a stock of merchandise which had been levied upon by the sheriff under a writ of attachment sued out by the Kilpatrick-Koch Dry Goods Company against one Luchsinger. The plaintiff claimed under an instrument executed by Luchsinger in form of a bill of sale containing the following provision: "The said F. L. Blumer agrees to take immediate possession of the said property, to sell the same at retail in the usual course of trade and to account to the said Fred Luchsinger for any sum or surplus there may be over the said amount of money first above named, and the expenses of keeping said property and selling the same as aforesaid." This instrument was given ostensibly to secure the payment of a debt from Luchsinger to Blumer, and there is evidence tending to show that Blumer took immediate possession under the bill of sale and retained possession until the levy of the attachment. The sheriff and the Kilpatrick-Koch Dry Goods Company, which was allowed to intervene, contended that the conveyance to Blumer was in fraud of creditors.

The court instructed the jury in the first instruction given

that the burden of proof was upon the plaintiff to establish by a preponderance of the evidence that he was entitled to the possession of the property, and that in determining that question the jury should determine under the evidence, first, the purpose for which the instrument already described was given and accepted, and second, whether it was given to secure a *bona fide* debt. The instrument was in all respects similar in form to that under consideration in *Sloan v. Cobscook*, 26 Neb., 607. It was held in that case that such an instrument was in effect a chattel mortgage, and that it was not void on its face. The fact of the execution and delivery of the instrument was admitted of record, and, as we have said, there was proof tending to show that Blumer took immediate possession thereunder. There was established a conveyance in fact and in form, and if immediate possession was taken by Blumer, the presumption was that the conveyance was in good faith. Fraud is never presumed, but must be proved by the party alleging it. The burden is on one attacking the validity of a transaction to establish its invalidity. (*Clemens v. Brillhart*, 17 Neb., 335.) To this rule, in such cases as the present, our statute (ch. 32, sec. 11, Compiled Statutes) creates one exception, to-wit, that where a conveyance of chattels or mortgage thereon is not accompanied by an immediate change of possession and followed by continued possession in the grantee, such conveyance or mortgage is presumably fraudulent as against creditors and throws upon the grantee the burden of showing that it was made in good faith and without intent to defraud. There could be no inference from the instruction quoted except that, regardless of the evidence tending to show a change of possession, the burden of proof was put on plaintiff to establish his good faith.

The second instruction is open to the same objection.

The fifth instruction is as follows:

"5. The burden is cast on the plaintiff to satisfy you by a preponderance of the evidence that he paid a considera-

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tion for the execution of the instrument under which he claims the right to the possession of the goods and chattels in controversy. If the plaintiff has satisfied you by a preponderance of the evidence in the case that the instrument under which he claims possession of the property was based upon a valuable consideration, then the burden of proof is cast upon the defendant to show by a preponderance of the evidence that the instrument was given by Luchsinger for the purpose of cheating and defrauding his other creditors; and if the testimony does so satisfy you by a preponderance of the evidence, then it becomes incumbent on the plaintiff to satisfy you by a preponderance of the evidence that he, the plaintiff, did not participate in or have knowledge of such fraudulent intent and purpose of said Luchsinger and that he, the plaintiff, took the instrument in good faith and for the purpose of securing a *bona fide*, then existing, debt from Luchsinger to him."

It is doubtful whether the direct instructions in the first and second paragraphs, that the burden was on plaintiff to show good faith, could be corrected by a subsequent instruction stating the rule correctly, but even if they could, this fifth paragraph did not state the rule correctly. It is not the law that the burden of proof of fraud depends solely upon the existence of a valuable consideration, nor is it the law that when a creditor has established a fraudulent intent on the part of the debtor, the burden shifts and the grantee is required to show that he did not participate in such fraudulent intent. On the contrary, except in cases where the burden is on the party claiming under the conveyance to establish his good faith, a creditor attacking the conveyance must show by a preponderance of the evidence both that the grantor was actuated by a fraudulent intent and that the grantee participated therein or had notice thereof. For the errors referred to the judgment must be reversed and the cause remanded.

REVERSED AND REMANDED.

OSCAR DILLON V. NELLIE D. STARIN.

FILED APRIL 16, 1895. No. 6209.

1. **DIVORCE: PUBLICATION OF NOTICE: ALIMONY.** In an action for divorce, where the husband is a non-resident served only by publication of notice and he does not appear, the court has no jurisdiction to render a personal judgment, as for alimony.
2. ———: **DISPOSITION OF PROPERTY.** Section 18, chapter 25, Compiled Statutes, providing that on dissolution of a marriage the court may make a decree restoring to the wife personal estate that shall have come to the husband by reason of the marriage or awarding to her the value thereof, refers to property which the law gives the husband by reason of the marriage and not to property obtained by the husband from the wife by gift or contract.
3. ———: ———: **PLEADING AND PROOF.** A petition alleging that a certain sum had come to the husband by reason of the marriage and praying restitution thereof is not supported by proof of money voluntarily advanced by the wife to the husband after the marriage.

. **ERROR** from the district court of Otoe county. Tried below before CHAPMAN, J.

M. L. Hayward and P. C. Jessen, for plaintiff in error.

John C. Watson, contra.

Good & Good, amici curiæ.

See opinion for citations.

IRVINE, C.

The record in this case discloses that the parties were married in Missouri in 1875. In 1879 they took up their residence in Kansas. Some time thereafter the defendant in error came to the home of her mother in Nemaha county, in this state, and, after residing with her mother for some-

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thing more than two years, brought action in the district court of Nemaha county for a divorce and for alimony, or rather for a divorce and the restitution to her of the value in money of personal property which it was averred had come to the possession of Dillon by reason of the marriage. No personal service was had on Dillon. He was not in the state, nor was he a resident of the state. Constructive service was had by publication, and a decree allowed granting the defendant in error a divorce and giving her judgment for \$1,000, which the court found the plaintiff in error had received from the defendant in error because of the marriage. After the rendition of this decree the defendant in error married one Starin and removed to Minnesota. The plaintiff in error has also married, and at the time the present action was begun, resided in Arkansas. Dillon's father died in Otoe county, and Dillon, having temporarily come into that county because of his father's death, the present action was there instituted by Mrs. Starin. The theory of the action will best appear by a summary of the petition. It alleged the divorce proceedings in Nemaha county and set out *in extenso* the petition in that case. It then reasserted the truth of the allegations of that petition. It pleaded the decree, that the judgment allowed therein was not paid; averred the death of Dillon's father, and that Dillon had, as his father's heir, become seized of certain real estate in Otoe county, described in the petition. The prayer was for a judgment of \$1,000, with interest from the date of first decree, and that such judgment be charged upon said real estate as a lien thereon. Dillon, in answer, denied the truth of the allegations upon which the divorce was granted; denied that he had any knowledge of those proceedings; averred that he never received from the plaintiff any sum except \$300, of which he had repaid \$165, the remainder having been consumed for the maintenance of the family; denied the jurisdiction of the court to grant the relief prayed, and averred that the

judgment for money in the divorce case was void. The case was tried to the court without a jury, the court finding that defendant had used of plaintiff's separate property the sum of \$600, for which sum, with interest, amounting to \$1,049.50, judgment was rendered against the defendant and made a lien on defendant's interest in the land of his father. To reverse this judgment or decree the defendant instituted these proceedings.

Some of the assignments of error are directed against the admission of evidence. These assignments will not be noticed, for the reason that the case was tried to the court, and the admission of improper evidence was, therefore, not in itself reversible error. The assignment that the finding and judgment are not supported by sufficient evidence presents the questions which have been argued by counsel.

Our statute (ch. 25, sec. 10, Compiled Statutes) provides that in all cases of divorce, alimony, and maintenance, when personal service cannot be had, service by publication may be made as provided by law in other civil cases under the Code of Civil Procedure. This statute is wholly ineffectual to sustain a judgment for alimony or maintenance based upon service by publication against a non-resident who does not appear in the action. It has been many times decided in this state and elsewhere that a judgment for alimony is a judgment *in personam*. It is perfectly clear upon principle, and thoroughly settled by the authorities, that while a state may provide for constructive service in a divorce case, so that the decree rendered will be valid as affecting the status of the parties, it is beyond the power of the legislature to confer jurisdiction to render a personal judgment against a non-resident in this manner, and that a judgment for alimony based on such service is void. (*Bunnell v. Bunnell*, 25 Fed. Rep., 214; *Rigney v. Rigney*, 127 N. Y., 408; *Beard v. Beard*, 21 Ind., 321; *Lytle v. Lytle*, 48 Ind., 200; 1 Am. & Eng.

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Ency. of Law, 468, and cases there cited.) The same rule has been announced in this state in *Johnson v. Johnson*, 31 Neb., 385. *Johnson v. Johnson* was an action in the nature of a creditor's bill supplemental to a decree similar to that rendered in the case in Nemaha county, by which it was sought to subject land belonging to the husband, but the title to which stood in the name of another, to the payment of the judgment. The husband appeared in the latter proceedings, and a judgment in favor of the wife was affirmed; but this was upon the ground that Johnson's appearance had conferred upon the court in these supplemental proceedings jurisdiction to try anew and determine the question of alimony. The decree was not based on that in the divorce case, which was considered and treated as void so far as it was *in personam*. The character of the pleadings and the precise nature of the proceedings do not appear from the report of the case. The court, however, laid stress upon the fact that the proceedings were supplemental to the divorce and in the same court which granted it. The judgment for \$1,000 in the district court of Nemaha county was, therefore, without jurisdiction, and could not be made the foundation of an action. Mrs. Starin, in her petition in this case, clearly counted upon this judgment, but she evidently endeavored to aver at the same time facts constituting a separate cause of action by reasserting the averments of her petition in the divorce case. It is quite clear that the district court considered the first judgment void and proceeded upon the theory that this was an original action, because its finding was that the defendant had received of the plaintiff's separate property \$600 instead of \$1,000, as found in the divorce case. In *Earle v. Earle*, 27 Neb., 277, it was held that courts of equity have power to enforce the duty of a husband to support his wife in an action for that purpose without reference to a divorce. In *Cochran v. Cochran*, 42 Neb., 612, it was held that after a husband has obtained a divorce upon

constructive service the wife may maintain an independent action for alimony. It would seem, therefore, that the court granting the divorce having had no jurisdiction to pass upon the property rights of the parties, Mrs. Starin might maintain a separate action to determine those rights, even to the extent of suing for alimony as such, unless her subsequent marriage defeated the right,—a question argued in the briefs, but one which it is not necessary to decide. Was this a case of that nature; and if so, does the evidence support the judgment? No objection having been made to the double aspect of the petition, it is quite probable that the district court was justified in treating it as an original action. If so, it must stand solely upon the averment that “personal property to the amount of more than \$3,000, the sole property of this plaintiff, has come to the said defendant by reason of the said marriage.” This averment was evidently made to bring the case within chapter 25, section 18, Compiled Statutes, providing that upon the dissolution of a marriage the court may make a further decree restoring to the wife the whole or such part as it shall deem just and reasonable of the personal estate that shall have come to the husband by reason of the marriage, or awarding to her the value thereof to be paid by the husband in money. This section immediately follows a section providing that when a decree of divorce shall be granted, the wife shall be entitled to the possession of her real estate in like manner as if her husband were dead. This act was passed prior to the enactment of the married woman’s act, and it is very evident that the two sections referred to have reference to the property rights of a husband as they existed at common law, and that their object was to restore the wife to her property rights on dissolution of marriage and prevent the husband from retaining the personal property and possession of the real estate thereafter. The language, “personal estate that shall have come to the husband by reason of the marriage,” means,

therefore, personal property, the right to which the law casts upon the husband because of the marriage. The property for which this judgment was rendered was not property of this character. It was money which came to the wife as the proceeds of land inherited from her father. The marriage gave the husband no right to it. The evidence shows that the wife, of her own volition, paid a debt of the husband therewith. It therefore came to the husband by reason of a gift or a loan, we do not determine which, and not by reason of the marriage. The distinction is important. Questions of property may arise between husband and wife in this state in three ways: First—Because of the legal obligation cast upon the husband to maintain his wife. Because of that obligation the courts, in a proper action, may require the husband to pay money to the wife for her support regardless of any business transactions between them. Such an allowance may properly be described as alimony. Second—Under sections 17 and 18, above referred to, where the law by reason of the marriage has conferred upon the husband property belonging to the wife, the court, when the marriage is dissolved, may restore such property to the wife. Third—Under the married woman's act, Compiled Statutes, chapter 53, the wife is practically emancipated and may now enter into contractual relations with her husband. Such relations may give rise to claims precisely of the character existing under similar circumstances between strangers.

Skinner v. Skinner, 38 Neb., 756.) Treating the petition in this case in the light most favorable to the plaintiff, it stated a cause of action under the second class, while the proof tended to establish a cause of action under the third class. The *allegata et probata* must agree, and under a petition charging a cause of action based purely on marital rights, proof of purely contractual obligations is irrelevant.

REVERSED AND REMANDED.

CONSOLIDATED TANK LINE COMPANY V. BENDIX
PIEN ET AL.

FILED APRIL 16, 1895. No. 6364.

1. **Ejectment: EVIDENCE.** The declarations of a former owner of land are not admissible as against those claiming under him when made after he has conveyed the land.
2. ———: ———. The evidence *held* sufficient to sustain the verdict.

ERROR from the district court of Hall county. Tried below before HARRISON, J.

W. H. Platt, for plaintiff in error.

W. A. Prince, *contra*.

IRVINE, C.

This was an action of ejectment by the plaintiff in error against Bendix Pien and Johann Frederick Wiese for a small tract of land adjoining the city of Grand Island. The plaintiff, in 1888, purchased a tract including that in dispute. Bendix Pien had been the owner of a tract immediately north of this for many years and in 1887 conveyed it to Wiese by warranty deed. The tract, as fenced and occupied by the defendants, included a portion of that claimed by the plaintiff, and this portion was the land in controversy. The contest was practically centered upon the plea of adverse possession interposed by defendants. There was a verdict and judgment for defendants.

Plaintiff in error argues but two assignments. One of these relates to the exclusion of evidence, and the other is that the verdict is not sustained by the evidence. Of the latter assignment it is sufficient to say that the evidence has been examined and that it discloses a conflict in some par-

ticulars rather remarkable. We are satisfied that there was sufficient to sustain the verdict of the jury. The other assignment is that the court erred in excluding the evidence of an admission made by Pien. It would be inferred from the evidence that Pien continued, after his conveyance to Wiese, to reside on the land with Wiese. The nature of his residence does not appear. The admission referred to, according to the offer made by plaintiff, must have been made in 1889, two years after Pien had conveyed his whole estate to Wiese, and was to the effect that Pien knew his fence was beyond his line. It has been held in this state, in accordance with the general rule, that the declarations of a person in possession of property as to his title are admissible against him and all persons claiming under him (*Cunningham v. Fuller*, 35 Neb., 58); but we do not think that this rule extends so far as to authorize the admission in evidence of declarations by a grantor of land made after the conveyance in disparagement of the title conveyed. To admit such evidence would open the door to fraud, and would permit the grantee's estate to be divested by the statements of his grantor contrary to the terms of his deed. The reasons given for admitting in evidence the declarations of a former owner are that the declarant was so situated that he probably knew the truth, and that the declaration in disparagement of his title, being against his interest, was probably true. The latter reason fails altogether when the former owner has parted with his interest before making the declarations. (*Chadwick v. Fonner*, 69 N. Y., 404.) That such admissions are not receivable in evidence when made after the grantor has parted with his title see *Christie v. Bishop*, 1 Barb. Ch. [N. Y.], 105. There was no error in excluding this evidence.

JUDGMENT AFFIRMED.

HARRISON, J., not sitting.

JOHN H. BOUGHN V. STATE OF NEBRASKA.

FILED APRIL 16, 1895. No. 6439.

1. Limitation of Actions: INDICTMENT AND INFORMATION.

Under section 256 of the Criminal Code, an indictment must be found or information filed within the time fixed by that section. It is not sufficient that the prosecution be instituted by complaint, arrest, or preliminary examination within such period.

2. Criminal Law: PLEA: STATUTE OF LIMITATIONS. The defense of the statute of limitations may in a criminal prosecution be availed of under a plea of "not guilty."

ERROR to the district court for Cedar county. Tried below before NORRIS, J.

Wilbur F. Bryant, for plaintiff in error:

A defendant in a criminal case may avail himself of the statute of limitations under a plea of the general issue. (Bishop, Statutory Crimes, 264; 1 Starkie, Criminal Pleading & Practice [2d ed.], 339; Wharton, Criminal Pleading & Practice, 317; Maxwell, Criminal Procedure, 4; *White v. State*, 4 Tex. App., 490.)

George H. Hastings, Attorney General, for the state, cited: *State v. Yates*, 36 Neb., 287.

IRVINE, C.

An information was filed May 1, 1893, in the district court of Cedar county charging the plaintiff in error with assault and battery committed May 16, 1891. One defense was that the prosecution was barred by the statute of limitations. The plaintiff in error sought to present this defense by objecting to the introduction of any evidence on the ground that the information on its face showed that the prosecution was barred; second, by a request for an instruction to find "not guilty" on that account; third, by

presenting in the motion for a new trial the question of the sufficiency of the evidence; and fourth, by a motion in arrest of judgment. The rulings on all these points were adverse to the plaintiff in error. Some of the rulings have not been preserved for review by proper exceptions and assignments of error, still if the prosecution was in fact shown to be barred the verdict was not sustained by the evidence, and the conviction must be, for that reason, reversed unless the defense cannot be presented under a plea of "not guilty." Two questions are therefore presented: Did it appear that the prosecution was barred by the statute, and did the plea of "not guilty" present such defense?

Section 256 of the Criminal Code is as follows: "No person or persons shall be prosecuted for any felony (treason, murder, arson, and forgery excepted), unless the indictment for the same shall be found by a grand jury within three years next after the offense shall have been done or committed. Nor shall any person be prosecuted, tried, or punished for any misdemeanor or other indictable offense below the grade of felony, or for any fine or forfeiture under any penal statute, unless the indictment, information, or action for the same shall be found or instituted within one year and six months from the time of committing the offense, or incurring the fine or forfeiture, or within one year for any offense, the punishment of which is restricted to a fine not exceeding one hundred dollars, and to imprisonment not exceeding three months; *Provided*, That nothing herein contained shall extend to any person fleeing from justice; *Provided, also*, That where any suit, information, or indictment for any crime or misdemeanor is limited by any statute to be brought or exhibited within any other time than is hereby limited, then the same shall be brought or exhibited within the time limited by such statute; *And provided, also*, That where any indictment, information, or suit shall be quashed, or the proceedings in the same set aside or

reversed, on writ of error, the time during the pendency of such indictment, information, or suit so quashed, set aside, or reversed, shall not be reckoned within this statute, so as to bar any new indictment, information, or suit for the same offense." It is conceded by the state that by this section the action must be instituted within one year after the commission of the offense; but it is contended that the punishment provided by law being at the time the offense was committed a fine of not exceeding one hundred dollars or imprisonment not exceeding three months, or both, the case was not within the jurisdiction of a magistrate to try (*State v. Yates*, 36 Neb., 287); that, therefore, the action must have been instituted by a complaint and preliminary examination before the magistrate, and that the institution of the action in that manner, and not the filing of the information, must determine whether the prosecution was begun within time, and that it does not appear from the record that the action was not so instituted within one year from the commission of the offense. We cannot accept this construction of the statute. The word "instituted" evidently refers back to the clause "for any fine or forfeiture under any penal statute." Where the action is of such a character, it must be instituted within the time fixed by the statute, but where the prosecution is for a misdemeanor, the indictment must be found or the information filed within the statutory period. So construing the statute, it is undisputed that the offense was committed almost two years before the information was filed and that the prosecution was in fact barred. As to whether it is necessary to specially plead the statute of limitations, or whether, on the other hand, it may be availed of under the general issue, the authorities are in conflict. We think, however, that the later cases, and those best based upon principle, are to the effect that the statute of limitations may be availed of under a plea of "not guilty." (*Hatwood v. State*, 18 Ind., 492; *State v. Carpenter*, 74 N. Car., 230; *White v. State*, 4 Tex.

Pollard v. Huff.

App., 488; Wharton's Criminal Pleading & Practice, sec. 318.) In *United States v. Cook*, 17 Wall., 179, Mr. Justice Clifford, while holding that where any exceptions are included in the statute the defense cannot be raised by demurrer, says that the rule in *Hatwood v. State* is undoubtedly correct. The reason for this rule is that the general issue in a criminal prosecution is broader than in a civil action and casts upon the state the burden of proving every element of the offense, including the fact that it was committed within the period of limitations. Under our Code there exist special reasons for adopting this rule, because the Code expressly provides (sec. 449) what offenses must be specially pleaded in bar, and the statute of limitations is not one of them.

REVERSED AND REMANDED.

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H. M. POLLARD ET AL. V. E. T. HUFF ET AL.

FILED APRIL 30, 1895. No. 6402.

1. **Negotiable Instruments: INDORSEMENTS: GUARANTY.** An agreement in the following form: "For value received we hereby guaranty payment of the within note at maturity, or any time thereafter, waiving protest and notice of non-payment," *held*, not a mere guaranty, but an indorsement with an enlarged liability.
2. ———: **ACCOMMODATION NOTE: CONSIDERATION.** An accommodation note or bill, within the meaning of the law merchant, is one which is made or accepted not upon a consideration, but for the purpose of enabling the payee or holder to raise money on credit.
3. ———: **EVIDENCE.** Evidence examined, and *held* not to sustain the verdict and judgment in favor of the defendants as makers of the notes in controversy.

ERROR from the district court of Lancaster county.
Tried below before STRODE, J.

Atkinson & Doty, for plaintiffs in error.

Davis & Hibner, J. E. Philpott, and Field & Holmes,
contra.

POST, J.

This is an error proceeding from the district court of Lancaster county. It appears from the transcript filed with the petition in error that two actions were commenced in the court below by the plaintiffs in error as assignees of D. W. Haydock, insolvent, to recover from the defendants therein, who are also defendants in error, on three promissory notes, bearing date of August 24, 1891, each for \$1,407.78, due in three, six, and nine months, and bearing interest at the rate of eight per cent per annum from date. Said causes were by order of the court consolidated for trial, and will, for the purpose of this proceeding, be treated as one action. The transactions out of which the controversy arose are exceedingly complicated, and have required repeated examinations of a voluminous transcript, and also of a bill of exceptions so inartistically prepared as to impose upon this court much additional labor. The undisputed facts as disclosed by the pleadings and proofs, may be summarized as follows:

1. In the year 1890 the Lawrence Implement Company, a Nebraska corporation, whose place of business was in the city of Lincoln, was indebted to D. W. Haydock, of St. Louis, Missouri, for merchandise in the sum of \$5,263.

2. September 24, of that year, said corporation, by its president, F. P. Lawrence, one of the defendants, executed in favor of E. S. Hawley, also a defendant, its promissory note for \$2,500, payable January 1 after date, with interest at ten per cent, the consideration therefor being the corporate indebtedness aforesaid to Haydock. At the same time said note was indorsed by the defendants as follows:

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"For value received we hereby guaranty payment of the within note at maturity, or at any time thereafter, waiving protest and notice of non-payment.

"F. P. LAWRENCE.

"E. T. HUFF.

"E. S. HAWLEY."

3. December 15, following, said company executed its note to the said D. W. Haydock for the sum of \$2,622.60, due May 3, 1891, with interest at eight per cent, which note was at the same time indorsed by the defendant as follows:

"For value received I hereby guaranty the payment of the within note and any renewal of the same, and hereby waive protest and notice of non-payment and suit against the maker, and consent that the payment of this note may be extended from time to time without affecting my liability thereon.

FRANK P. LAWRENCE.

"E. T. HUFF.

"E. S. HAWLEY."

4. March 3, 1891, said implement company executed its note in favor of said Haydock for \$4,500, due one day after date, and on the 9th day of the same month it executed a note in favor of the same payee for \$763.61, due one day after date, without consideration other than the indebtedness above mentioned.

5. March 9, 1891, suit was brought on the note of \$4,500, aided by attachment, and on March 11 the implement company, by its president, F. P. Lawrence, answered, admitting all the allegations of the petition, and authorizing judgment against it for the amount claimed, which was entered accordingly, accompanied by an order for the sale of the property seized under and by virtue of the order of attachment. Judgment was subsequently recovered on the note for \$763.71, although nothing has been realized on either, and both judgments, as well as the original indebtedness, are wholly unsatisfied.

6. March 12, 1891, action was brought by Haydock, as holder, against these defendants on the note of \$2,500, dated September 24, 1890, and an order of attachment procured against Hawley and Huff, on an affidavit charging that they were about to convert their property into money with intent to defraud their creditors, and had assigned, removed, and disposed of their property with like fraudulent intent, and on May 14, following, suit was brought by Haydock on the note of \$2,622.60, dated December 15, 1890.

7. April 24, 1891, the attachment last mentioned having been discharged as to Huff on the ground that the statements of the affidavit therefor were untrue, the latter commenced an action against Haydock on the bond given to secure said order.

8. August 24, 1891, the three actions then pending were settled and subsequently dismissed, the order of dismissal in each case being based upon a written stipulation, substantially in the following form, varying only with the titles of the several causes, and the signatures of the parties:

"DANIEL W. HAYDOCK	}
v.	
FRANK P. LAWRENCE, E. S.	
HAWLEY, AND E. T. HUFF.	}

"It is understood and agreed that the assignees of Daniel W. Haydock, being H. M. Pollard and John M. Camp, shall, and do, hereby dismiss the above entitled suit and pay the costs of the same for certain valuable considerations."

The considerations, to which reference is therein made, were first, the allowance by the plaintiffs of a credit in the sum of \$1,260, as damage in the suit by Huff on the attachment bond given by Haydock; second, the execution by defendants of the three notes in suit, which represent the amount of Haydock's claim on the prior notes, less the credit thus allowed.

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9. On and prior to March 3, 1891, said Haydock and the several defendants were stockholders of, and desirous of promoting the success of, the Lawrence Implement Company, and the notes of September 24 and December 15, 1891, were executed by said defendant as sureties for the accommodation of said corporation.

In addition to the foregoing facts, it is alleged by the defendants that the consideration for the \$4,500 note executed by the implement company March 3, 1891, was the express promise and agreement of Haydock, the payee thereof, to surrender the two notes last described. Their contention with respect to the notes in suit will be understood from the following quotation from the separate answer of Huff, which does not differ essentially from the other answers: "That on the said 24th day of August, 1891, this defendant, then not knowing that the said two notes in this answer described were the same notes which the said D. W. Haydock had so promised to return, and for the payment of which he had so taken the note for \$4,500, and upon which last note the said D. W. Haydock had taken judgment, the defendant then and there paid to the plaintiffs on the said two notes sued upon the sum of \$1,260, and in the further settlement of the said two cases, then and there believing that said two notes sued upon in the said two suits was other and different indebtedness, and founded on other considerations than hereinbefore set forth, under and by reason of the statement of fact herein stated, did execute and deliver the said note sued on in this action." In a second defense of each answer it is alleged that the defendant, on the 24th day of August, 1891, believing himself liable as guarantor upon the notes therein sued on, paid to plaintiffs the sum of \$1,260 in partial satisfaction of said notes. And each prays for judgment in the amount so paid. The \$1,260 therein mentioned is, it should be remarked, conceded to be the amount allowed by plaintiffs in settlement and satisfaction of the suit by Huff

on Haydock's attachment bond. These allegations are all denied by plaintiffs, who contend that the note of March 3, 1891, was executed at the suggestion of Lawrence, and that the attachment suit thereon, which immediately followed, was brought at the request of the latter for the protection of these defendants as against other creditors of the implement company, which was then insolvent.

From this analysis it is evident that the entire controversy must turn upon the construction to be given the transaction of August 24, to which that of March 3 is merely an incident, and important only in so far as it tends to characterize the former. From a more careful scrutiny of the defendants' position regarding the occurrence of March 3 their contention may be thus stated: Haydock, who in September and December, 1890, was unwilling to accept the notes of the implement company without security, in March, 1891, at a time when said corporation was hopelessly insolvent, agreed to exchange its secured notes, aggregating \$5,122.60, exclusive of interest, for its unsecured obligations. Viewed in the light of the evidence, such a claim appears, to say the least, altogether unreasonable. In the first place the secured notes were not surrendered, but, on the other hand, suit was brought thereon a few days later; second, although the files and records of those cases were introduced in evidence, we cannot discover that such a defense had ever been interposed by either of the parties, at or prior to the date of the settlement, to-wit, August 24. It is possible that the judgment in this case, if resting upon the finding with respect to that issue alone, might be sustained, but when we take into consideration the transactions on the last named day as disclosed by the undisputed evidence, we are unable to perceive for it any foundation whatever. Aside from the documentary evidence above set out, the proofs with respect to the settlement in question is confined to the testimony of Mr. Philpott, who appeared as counsel for Hawley and Huff in the actions then

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pending, and who represents the last named defendant in this proceeding, and of Mr. Doty, attorney for the plaintiffs herein. The first named witness, referring to the settlement, testified in chief for the defendants:

I proposed to Mr. Pollard [one of the plaintiffs], or Mr. Pollard proposed to me, an adjustment of the two suits that had been begun on the notes, and after talking the matter over part of one day, probably the 23d or the 24th, we came to a conclusion on which the two cases were to be dismissed, and Huff was to be allowed \$1,260 on the damage suit, and he was to dismiss that. Then I suggested the notes sued on. There were three of them, and the amount of the \$2,500 note with interest and the \$2,600 note with interest were added up, making a total of about \$5,483, and this \$1,260 was to be taken from that, leaving about \$4,100, and three notes were drawn up, payable in three, six, and nine months after date. I informed Mr. Huff of what I had done, and suggested to him that he should sign them, all the notes being really for the amount of the judgment already taken, and he did so. Mr. Lawrence, I suppose, signed. Mr. Hawley was not in the city. I was informed that he was in Nebraska City, and wrote him recommending him to sign them.

Q. During this time you also represented Hawley?

A. Yes.

Q. Under your advice he gave the note now sued on?

A. Yes; and on the faith of this it was under my and depending on the understanding that there was no indebtedness for anything before. Under that I advised them both to sign.

Neither defendant was examined with respect to the transaction under consideration. We will, however, adopt the foregoing version thereof as the most favorable to their contention. There is, it will be observed, an entire failure of proof tending to sustain the allegation that the notes in suit are the result of a mistake on the part of the defend-

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ants, or any of them. It would certainly be discrediting their intelligence to admit that they did not fully comprehend the terms and conditions of the settlement or the precise nature of the obligation they were assuming. They knew that the prior notes had not been surrendered, but that, on the contrary, actions were pending thereon against them, in which Haydock or his assignees were seeking to charge them as indorsers. They knew that the three notes in suit represented the exact amounts claimed in those actions, less the credit agreed upon in favor of Huff, and the claim that they executed said notes in the belief that they were to apply upon other or different indebtedness of the implement company is unworthy of consideration.

Much is said in the charge of the court and in the brief of counsel for defendants about the original notes being accommodation paper. True, they were accommodation notes in one sense, and one only. They were executed by defendants in order to accommodate, or, in other words, as surety for the implement company. An accommodation note or bill within the meaning of the law merchant is one which is made or accepted not upon a consideration, but for the purpose of enabling the payee or holder to raise money on credit. (Randall, Commercial Paper, 472; Byles, Bills, 131.) The liability of the defendants was not that of guarantors merely, but of indorsers, with an enlarged liability. (*Heard v. Dubuque County Bank*, 8 Neb., 10; *Bloom v. Warder*, 13 Neb., 476; *Helmer v. Commercial Bank*, 28 Neb., 474; *Weitz v. Wolfe*, 28 Neb., 500; *Buck v. Davenport Savings Bank*, 29 Neb., 407.) It requires no argument to prove that such a liability is a sufficient consideration for the note of a surety given and accepted as a renewal of the original obligation. The judgment is not merely wrong, but there is an entire failure of proof, for which a verdict should have been directed in favor of the plaintiffs. This conclusion renders unnecessary an examination of the other questions presented.

REVERSED.

MARSHALL FIELD ET AL. V. R. H. MAXWELL ET AL.

FILED APRIL 30, 1895. No. 6240.

1. **Attachment: ACTION ON BOND: SET-OFF.** In an action upon an attachment undertaking, a claim due the principal in such bond from the plaintiff is a proper subject of set-off.
2. **Attorneys' Liens: SET-OFF.** An attorney's lien for services performed in prosecuting an action is not measured by the amount which his client claims to be his due, but cannot exceed the amount in the hands of the adverse party belonging to his client or the amount owing to him, and is not paramount to any proper set-off or other available defense in such action.

ERROR from the district court of Lancaster county.
Tried below before STRODE, J.

See opinion for statement of the case.

Montgomery, Charlton & Hall, for plaintiffs in error:

In an action upon an undertaking for an attachment, a claim due from the obligee in favor of the principal may be made the subject of set-off. (*Raymond v. Green*, 12 Neb., 215.)

The decree below was erroneous in the disposition of the claim for an attorney's lien. (*Tiffany v. Stewart*, 60 Ia., 207; *Watson v. Smith*, 63 Ia., 228; *Griggs v. White*, 5 Neb., 467; *Ward v. Watson*, 27 Neb., 769; *Rice v. Day*, 33 Neb., 205; *People v. New York C. P.*, 13 Wend. [N. Y.], 649; *Nicoll v. Nicoll*, 16 Wend. [N. Y.], 446; *Noxon v. Gregory*, 5 How. Pr. [N. Y.], 339; *Hill v. Brinkley*, 10 Ind., 102; *Mosely v. Norman*, 74 Ala., 422; *Simmons v. Almy*, 103 Mass., 33.)

R. D. Stearns and Wooley & Gibson, contra:

The attorneys were entitled to a lien. (*Reynolds v. Reynolds*, 10 Neb., 579; *Oliver v. Sheeley*, 11 Neb., 521; *Sayre*,

v. Thompson, 18 Neb., 33; *Boyer v. Clark*, 3 Neb., 161; *Abbott v. Abbott*, 18 Neb., 503; *Elliott v. Atkins*, 26 Neb., 403.)

The right of set-off cannot defeat an attorney's lien. (*Stratton v. Hussey*, 62 Me., 288; *Currier v. Boston & M. R. Co.*, 37 N. H., 223; *Johnson v. Ballard*, 44 Ind., 270; *Ward v. Watson*, 27 Neb., 768.)

Where the action is founded upon a negotiable instrument or a contract in writing which is in the attorney's possession, the lien attaches to the contract before judgment, and his client can make no settlement or assignment of the action without discharging the attorney's fees. (*Reynolds v. Reynolds*, 10 Neb., 574; *Coughlin v. New York C. & H. R. R. Co.*, 71 N. Y., 443; *Kusterer v. City of Beaver Dam*, 56 Wis., 471; *Dennett v. Cutts*, 11 N. H., 163; *Schwartz v. Jenney*, 21 Hun [N. Y.], 33.)

HARRISON, J.

July 20, 1891, plaintiffs in error commenced an action in the district court of Lancaster county against the defendants in error, upon a guaranty, to recover the sum of \$1,513.45 and interest, and also in connection with the action instituted attachment proceedings, in which an order issued and a levy was made. The attachment was dissolved of date September 21, 1891, and on October 1, 1891, the defendants in error commenced an action against plaintiffs in error in justice court of Lancaster county, upon the bond which had been given in the attachment proceedings, and claimed damages in the sum of \$200. On October 6, 1891, the plaintiffs in error filed an answer in this suit in justice court, consisting of a general denial and an affirmative defense, alleging the liability of defendants in error upon the guaranty, and asking that any amount found due the defendants in error upon the bond as damages should be credited on their claim by reason of such contract of guaranty, and on the same day attorneys for defendants in

error filed in the justice court notice of attorney's lien in the sum of \$100. A trial of the cause in justice court resulted in a judgment in favor of defendants in error, and an appeal was perfected by plaintiffs in error to the district court, and after petition and answer were filed, a motion was made on behalf of plaintiffs in error for the consolidation of the appeal case with their action against defendants in error upon the guaranty, then still pending in the district court. This motion was sustained and the causes were consolidated. A jury was waived and a trial of the action had to the court and the following judgment rendered:

"This cause, having been heretofore on a former day of this term of court, to-wit, February 8, 1893, tried and submitted to the court, now comes on for final determination, and after due consideration, and being fully advised in the premises, the court finds that there is due the plaintiffs Marshall Field & Co. upon the cause of action set forth in their petition from the defendants R. H. Maxwell, Frank Sharpe, and Thomas Ross the sum of \$1,513.45 principal and \$317.80 interest thereon, making a total sum of \$1,831.25.

"The court further finds that there is due the defendants R. H. Maxwell, Frank Sharpe, and Thomas Ross the sum of \$100 by reason of the wrongful attachment proceedings set forth in their answer and counter-claim and for attorneys' fees in procuring a dismissal of said attachment, and the court further finds that the said plaintiffs Marshall Field & Co. and the defendant H. R. Nissley are liable to said defendants R. H. Maxwell, Frank Sharpe, and Thomas Ross for said sum upon their undertaking for said attachment.

"It is therefore considered and adjudged by the court that the said plaintiffs Marshall Field & Co. do have and recover of and from the said defendants R. H. Maxwell, Frank Sharpe, and Thomas Ross the sum of one thousand

eight hundred thirty-one and $\frac{25}{100}$ (\$1,831.25) dollars, as above found due them, with interest thereon at the rate of seven per cent per annum from this date until paid, together with the costs of this action, taxed at \$38.95.

"And it is further considered and adjudged by the court that the said defendants R. H. Maxwell, Frank Sharpe, and Thomas Ross do have and recover of and from the said plaintiffs Marshall Field & Co. and H. R. Nissley the sum of one hundred and $\frac{00}{100}$ (\$100.00) dollars damages sustained by them as above set forth, with interest thereon at the rate of seven per cent per annum from this date until paid, together with the costs of this proceeding, taxed at \$41.30.

"The court further finds that Messrs. Wooley & Gibson and R. D. Stearns have an attorney's lien upon said judgment of R. H. Maxwell, Frank Sharpe, and Thomas Ross, and against the said Marshall Field & Co. and H. R. Nissley in the sum of \$100, and it is considered and decreed by the court that said attorney's lien is prior and paramount to the claim and set-off of the said plaintiffs herein, or the said defendants R. H. Maxwell, Frank Sharpe, and Thomas Ross."

The second and third assignments of error refer to the right of plaintiffs in error to have the amount due them set off as against any sum ascertained to be due defendants in error as damages upon the attachment bond. In the case of *Raymond v. Green*, 12 Neb., 215, it was held by this court that in an action upon an undertaking in attachment, a claim due from the plaintiff in such action to the principals in the bond was a proper subject of set-off, and this seems decisive of the question raised in regard to the set-off in the case at bar, and in accordance with the rule then announced the claim of plaintiffs in error was a competent set-off.

The only further point raised by the assignments of the petition in error, which is argued, is in relation to the action

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of the court by which it declared and established the lien of the attorneys for the defendants in error paramount and superior to the set-off of plaintiffs in error. The lien of an attorney for compensation is provided for in section 8, chapter 7, Compiled Statutes, 1893, as follows: "An attorney has a lien for a general balance of compensation upon any papers of his client which have come into his possession in the course of his professional employment; upon money in his hands belonging to his client, and in the hands of the adverse party in an action or proceeding in which the attorney was employed from the time of giving notice of the lien to that party." This court considered the right to a lien conferred upon attorneys by the section of our statutes just quoted, in the case of *Boyer v. Clark*, 3 Neb., 161, cited by counsel for defendants in error in support of their position in this case. The case referred to was an action to set off a judgment in favor of Boyer against one in favor of Clark. McCandless, who, as attorney for Clark, had obtained the judgment in his favor involved in the action, claimed a lien on the judgment for the compensation for his services in securing it, and also its assignment to him. In relation to the lien of an attorney it was then stated as a general rule of law that "the lien of an attorney upon a judgment obtained by him, to the extent of his reasonable fees and disbursements, is paramount to any rights of the parties in the suit, or to any set-off;" and, in support of the rule announced, the learned judge who wrote the opinion cited the case of *Shapley v. Bellows*, 4 N. H., 353, in which the parties had executions upon judgments in the hands of the sheriff, the rights relative to the executions being such that under a statute of the state of New Hampshire either party was entitled to have one execution set off against the other by the officer. An attorney had a lien upon one of the judgments, the basis for one of the executions, for his fees and disbursements in the suit in which it was obtained. It was held in respect to

the lien of the attorney: "An attorney has a lien upon a judgment to the extent of his fees and disbursements in the suit in which it was obtained, and this right of lien is paramount to any right of the parties in the suit to have mutual executions against each other set off one against the other." The rule established by this court in *Boyer v. Clark* has been followed in *Ward v. Watson*, 27 Neb., 768, *Griggs v. White*, 5 Neb., 467, and *Rice v. Day*, 33 Neb., 204, and quoted with approval in some other cases in this court, but they have been causes in which it was sought to have one judgment set off against another, and as to one of which judgments the lien of an attorney for fees had attached, or where the rights of an attorney in an action, to a lien for compensation due him for services therein on money in the hands of the adverse party and which was the subject of the litigation and who had given the proper notice of his lien for his fees in the action, under certain circumstances to be permitted to become a party to the suit and continue the litigation to final determination or judgment, so that the amount due his client might be ascertained and his lien be enforced, was to be determined, and in none of the cases presented in this court in which the right of an attorney to a lien for his fees was considered and adjudicated was the question in the case at bar discussed or settled. By our statute an attorney is accorded a lien "for a general balance of compensation * * * upon money * * * in the hands of the adverse party, in an action or proceeding in which the attorney was employed, from the time of giving notice of the lien to that party." What money is in the hands of the adverse party is the subject-matter of the litigation and to be ascertained by the final determination of it and the court's judgment. The amount apparently or which it is claimed is in the hands of the adverse party must be liable to be lessened by any and all proper and available defenses in the action. It can be no more than is truly owing by the adverse liti-

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gant, for no more than this can be said or claimed to be in his hands belonging to the other party, and in this case, having determined that the claim of the plaintiffs in error was a proper matter of set-off in the pending action, it was available as a defense for them, and so long as any part of it remained unextinguished in this suit, there could be no money in the hands of plaintiffs in error to which the lien of the attorneys could attach. "In an action which is subject to a set-off, and which is so barred, the attorney's claim for services must, like the plaintiff's demand, yield to the set-off as it would to any other available defense to the action." (*Robertson v. Shutt*, 9 Bush [Ky.], 660.) "The statute (Code, sec. 214) provides that an attorney, by giving the proper notice, may have a lien for his compensation upon money due his client in the hands of the adverse party, in an action or proceeding in which the attorney claiming the lien was employed. * * * The spirit and meaning of the law is that the attorney may have a lien upon the amount which is ultimately found to be due his client. Any other construction of the statute would be obviously inequitable and unjust." (*Tiffany v. Stewart*, 14 N. W. Rep. [Ia.], 241.) See, also, *Nicoll v. Nicoll*, 16 Wend. [N. Y.], 443; *Popplewell v. Hill*, 18 S. W. Rep. [Ark.], 1054.) The judgment of the district court was erroneous and must be reversed and the cause remanded.

REVERSED AND REMANDED.

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6. A bill of exceptions should begin with a proper caption, the matter should be systematically arranged, and the judge should, by reference, identify the exhibits. *Vaughn v. Crites* 815

Bonds. See APPEAL BONDS. GUARANTY, 2. INJUNCTION, 2,**3. PRINCIPAL AND SURETY, 2-5. SET-OFF, 2.**

1. The object of a penalty in a bond is to fix the limit of the liability of the signers. *Morrison v. Beggs*..... 248

Bonds—concluded.

2. A supersedens in a forcible entry and detainer case, executed according to sec. 1090 of the Code, is not void for a failure to fix a sum of money as a penalty. *Id.*

Boundaries. See MUNICIPAL CORPORATIONS, 3, 6.

Breach of Contract. See SALES, 3.

Brokers. See FACTORS AND BROKERS.

Building Contracts. See CONTRACTS, 1, 9, 10.

Burden of Proof. See FRAUDULENT CONVEYANCES, 4.

Carriers. See RAILROAD COMPANIES. STREET RAILWAYS.
TELEGRAPH COMPANIES.

1. A carrier of passengers is liable for personal injuries produced by the concurrent negligence of its servants and third persons. *St. Joseph & G. I. R. Co. v. Hedge*..... 449
2. A passenger who is placed in imminent peril through the negligence of a carrier may recover for injuries received while endeavoring to escape, where he exercises ordinary prudence in view of the circumstances as they appear to him at the time. *Id.*

Champerty. See WILLS, 6.

Charters. See CORPORATIONS, 2.

Chattel Mortgages. See ATTACHMENT, 4. FRAUDULENT
CONVEYANCES, 3. REPLEVIN, 1.

Instruments discussed in the opinion *held* to be chattel mortgages rather than to constitute an attempted voluntary assignment. *Kilpatrick-Koch Dry Goods Co. v. Bremers*..... 863

Churches. See RELIGIOUS SOCIETIES.

Circulars. See INSURANCE, 5-7.

Cities. See MUNICIPAL CORPORATIONS.

Clergymen. See RELIGIOUS SOCIETIES, 3.

Clerk of District Court. See APPEAL, 2. BILL OF EX-
CEPTIONS, 4, 5.

Collateral Security. See NEGOTIABLE INSTRUMENTS, 3, 4.

Commission Merchants. See FACTORS AND BROKERS.
PRINCIPAL AND AGENT, 1.

Compromise and Settlement. See APPEAL, 5.

The settlement of a doubtful or disputed claim is generally a sufficient consideration for a compromise, but to have such effect it is essential that there be in fact a dispute or doubt of the rights of the parties. *Fitzgerald v. Fitzgerald & Mallory Construction Co.*..... 464

Conditional Sales. See SALES, 2.

Conflict of Laws. See NEGOTIABLE INSTRUMENTS, 9.

- In the absence of evidence to the contrary, the laws of another state will be presumed to be the same as those of the state of the forum. *Smith v. Mason*..... 611
Sturk v. Olsen..... 646

Consideration. See COMPROMISE AND SETTLEMENT. CONTRACTS, 3. FRAUDULENT CONVEYANCES, 7, 8.

Conspiracy. See CORPORATIONS, 8.

Constitutional Law.

1. Sec. 7, art. 11, of the constitution limits the legislature in the regulation of telegraph companies to correction of abuses and prevention of unjust discrimination. *Western Union Telegraph Co. v. Call Publishing Co*..... 326
2. If the legislature intended by sec. 49 of chap. 14, Laws, 1889, to repeal sec. 76 of the general road law, the former section is void under sec. 11, art. 3, of the constitution. *State v. Cobb*..... 434
3. Sec. 45, ch. 43, Comp. Stats., authorizing an attorney's fee where plaintiff recovers judgment against an insurance company on a policy covering realty, is valid. *Ins. Co. of North America v. Bachler*..... 550

Construction. See STATUTES, 3.

Contempt. See INJUNCTION, 7, 8.

- Disobedience of an injunction allowed by a county judge in an action brought in the district court is a contempt against the district court. *Wilber v. Woolley*..... 739

Contests. See WILLS.

Continuance.

1. Affidavits used on the hearing of a motion for continuance cannot be considered in the appellate court unless preserved by a bill of exceptions. *Nelson v. Johnson*..... 7
2. An attorney who is unprepared for trial when his case is called should make such a showing for postponement as lies within his power. *Corbett v. Nat. Bank of Commerce*..... 230

Contracts. See ALTERATION OF INSTRUMENTS. CORPORATIONS, 1. EVIDENCE, 2. GUARANTY. INSURANCE. LANDLORD AND TENANT, 1, 2. MECHANICS' LIENS, 8-10. NEGOTIABLE INSTRUMENTS, 9. PRINCIPAL AND AGENT, 1, 3. SALES. TELEGRAPH COMPANIES.

1. An assignment of money to be earned in the future under an existing contract is, in equity, valid and enforceable. *Perkins v. Butler County*..... 110

Contracts—concluded.

2. One who predicates his right to relief upon his alleged performance of the terms of a contract must show that he complied with each requirement. *Omaha Consolidated Vinegar Co. v. Burns*..... 21
3. The agreement of an employe of a railroad company, upon becoming a member of the relief department, that acceptance of relief funds should release the company from liability for damages in case of injury, is not against public policy or without consideration. *Chicago, B. & Q. R. Co. v. Bell*..... 44
4. Contracts made by persons who are directors of two rival corporations, with respect to subjects in which corporate interests are adverse, are voidable unless ratified by non-consenting stockholders. *Fitzgerald v. Fitzgerald & Malory Construction Co*..... 464
5. The illegality of an agreement, unless disclosed by the pleadings or proofs of the party claiming through it, must, in order to be available to the adverse party, be specifically pleaded. *Id.*
6. Failure of a party to comply with a provision to submit to arbitration in case of a dispute is not a defense in an action on a contract. Such agreements are void as against public policy. *National Masonic Accident Association v. Burr*..... 258
Ins. Co. of North America v. Bachler..... 550
7. The validity of a provision in an insurance contract requiring the insured, before bringing suit, to furnish a certificate of a notary public of the former's moral character, financial standing, and the officer's opinion as to whether the loss occurred from the fraud of the insured, is doubtful. *Home Fire Ins. Co. v. Hammang*..... 568
8. Construction of a provision in a contract for the sale of land authorizing the vendor in case of default in a payment to take immediate possession. *Ellsworth v. McDowell*..... 708
9. Under a building contract, the owner, by reserving the right to make payments by assuming lumber bills, does not assume payment of bills of which he had no knowledge. *O'Rourke v. Burke*..... 822
10. The reservation in a building contract of the right to change the plans implies, as against the contractor's guarantor, that the changes shall be such as might reasonably be considered within the contemplation of the parties when the contract was made. *Id.*

Contribution. See PRINCIPAL AND SURETY, 6-10.

Conversion.

Where a person who cares for live stock under an agreement to feed, sell, and deliver to the owner the proceeds after deducting expenses, appropriates the proceeds to his own use, the measure of damages in an action against him is the amount of such proceeds. *McCready v. Phillips*..... 790

Conveyances. See CHATTEL MORTGAGES. FRAUDULENT CONVEYANCES. MORTGAGES. VOLUNTARY ASSIGNMENTS.

Corporations. See PARTNERSHIP.

1. Contract set out in opinion construed, and held to be a subscription to the capital stock of a manufacturing company. *Lincoln Shoe Mfg. Co. v. Sheldon*..... 280
Lincoln Shoe Mfg. Co. v. Seifert..... 536
2. A corporation is formed under general laws, and those laws and the articles of incorporation constitute its charter. *Lincoln Shoe Mfg. Co. v. Sheldon*..... 281
3. The fact that all the stock authorized by the articles of incorporation of a manufacturing company has not been subscribed is not a defense in a suit upon a contract of subscription where ten per cent of the stock has been subscribed. *Id.*
4. Where the charter or powers of a railroad company are not shown by the pleadings or evidence, the court will not presume that the act of the company in organizing and conducting a relief department is *ultra vires*. *Chicago, B. & Q. R. Co. v. Bell*..... 44
5. Meaning of the term "scope of authority," as used in the law defining the liability of corporations for the tortious acts of their officers and agents. *Fitzgerald v. Fitzgerald & Mallory Construction Co*..... 463
6. Persons who are directors of two corporations have no implied authority to bind either by contracts with respect to subjects in which their interests are adverse. *Id.*..... 464
7. Authority of directors of a railroad company to sell at a discount below value its corporate bonds earned by a construction company in building a railroad, and liability of the railroad company to minority stockholders of the construction company for the loss occasioned by such a sale where the directors have a controlling interest in both companies. *Id.*..... 463
8. It was held that a certain loan to a construction company

Corporations—concluded.

of the bonds of a railroad company by the president thereof was a personal transaction in which the latter corporation had no interest, and that it was not made in pursuance of a conspiracy to wreck the construction company. *Id.*..... 464

Costs. See APPEAL, 3. ATTORNEYS' FEES. CONSTITUTIONAL LAW, 3.

1. Motion to retax and a ruling thereon are essential parts of a record to review the taxation of costs in the trial court. *Ins. Co. of North America v. Bachler*..... 550
2. Costs of the parties should be taxed and entered on the record separately. *Kissinger v. Staley*..... 784
3. A judgment of a justice of the peace reciting the amount of costs plaintiff is to recover, and referring to a separate taxation on the margin of the docket, is a sufficient compliance with sec. 39, ch. 28, Comp. Stats., in reference to taxation of costs. *Id.*
4. Where it appears from statements in the record that certain items of costs as taxed are proper charges they will be presumed to be correct in the absence of a showing to the contrary. *Id.*

Counties. See EXINENT DOMAIN, 2, 5. HIGHWAYS.

1. County commissioners can only transact the business of the county at regular sessions or at sessions called pursuant to law. *Morris v. Merrell*..... 423.
2. County commissioners cannot, during adjournment, without a call for a special session, make a valid order for the location and construction of a drainage ditch, and an assessment to pay for an improvement made under such circumstances is void. *Id.*

County Clerks. See MANDAMUS, 2.

County Treasurer. See TAX DEEDS, 2.

Courts. See ACTIONS. CONTEMPT. JUDGES. JUDGMENTS, 5. JUSTICE OF THE PEACE.

1. The court which first acquires jurisdiction of the subject of an action will retain it until the final determination of the controversy. *Fitzgerald v. Fitzgerald & Mallory Construction Co.*..... 465
2. The power to correct errors in their own proceedings is inherent in all courts of general jurisdiction. *Weber v. Kirkendall*..... 766

Criminal Law. See LARCENY.

1. An assignment that instructions were erroneous for the

Criminal Law—concluded.

- reason a verdict should have been directed for defendant under the evidence, will not be examined where a verdict of guilty is justified by the proofs. *Thompson v. State* 367
2. An assignment of error as to giving a group of instructions may be overruled when it is found that one of them is correct. *Id.*
 3. Where the surname and initials of the Christian name of a witness appear upon the information it is a sufficient compliance with the statute requiring names of the state's witnesses to be indorsed on the information. *Perry v. State*, 414
 4. Accused, unless a fugitive from justice, is entitled to a preliminary examination, in absence of a waiver thereof, before he can be placed upon trial under an information. *Coffield v. State*..... 417
 5. Accused may waive a preliminary examination when brought before the magistrate, or when called upon to plead to the information. *Id.*..... 418
 6. It is too late after verdict to urge the objection that a preliminary examination has not been had for the crime charged in the information. *Id.*
 7. An objection that there has been no preliminary examination must be raised by motion to quash or plea in abatement before going to trial. *Id.*
 8. To be available on review, alleged errors occurring at the trial must be pointed out in the motion for a new trial and specifically assigned in the petition in error. *Madsen v. State*..... 631
 9. Rulings not objected to in admitting evidence will be disregarded on review. *Thompson v. State*..... 366
 10. It is the duty of the court to present the issues to the jury whether requested or not, and a charge which, by the omission of certain elements, has the effect of withdrawing from the jury an essential issue of the case is erroneous. *Dolan v. State* 643
 11. The giving of an oral instruction over defendant's objection is reversible error. *Ehrlich v. State*..... 810
 12. A conviction in a criminal case will ordinarily be reversed whenever the attorney general, after an examination of the record, declines to file a brief on the ground that the judgment is not supported by the evidence. *George v. State*... 757
 13. The defendant in a criminal prosecution may avail himself of the defense of the statute of limitations under a plea of not guilty. *Boughn v. State*..... 889

Custom and Usage.

Burke v. Frye..... 226

Windsor v. Thompson..... 229

Damages. See CONVERSION. DECEIT. EMINENT DOMAIN, 1. FORCIBLE ENTRY AND DETAINER, 1. HIGHWAYS. INTOXICATING LIQUORS. RAILROAD COMPANIES. REVIEW, 3. SALES, 3. STREET RAILWAYS, 3. TELEGRAPH COMPANIES.

1. The agreement of an employe of a railroad company that acceptance of funds from the relief department shall release the company from liability in case of injury, is not a waiver of his right to sue for damages where he does not accept benefits. *Chicago, B. & Q. R. Co. v. Bell* 44

2. The amount due upon the judgment is the measure of damages in an action upon an appeal bond. *Flannagan v. Cleveland*..... 58

3. Where a telegraph company changes a message in transmission, and conveys incorrect information, it is liable for resulting damages. *Western Union Telegraph Co. v. Kemp*, 194

4. Mental and bodily suffering is incapable of measurement by any fixed rule, and the damages must depend largely upon the judgment of the jury under the circumstances of each case. *St. Joseph & G. I. R. Co. v. Hedge*..... 450

5. Verdict for \$3,000 for personal injuries held not excessive under the evidence. *Id.*

6. The wrong done and the injury sustained must bear toward each other the relation of cause and effect, and the damages must be the natural and proximate consequence of the act complained of. *Fitzgerald v. Fitzgerald & Mal-lory Construction Co.*..... 464

7. A land owner who is negligent in making improvements which cause surface water to flow upon land of an adjoining proprietor is liable for damages. *Lincoln & B. H. R. Co. v. Sutherland*..... 526

8. A person who takes up trespassing animals and holds possession under the herd law is liable for damages resulting from negligence in caring for them. *Richardson v. Halstead* 606

9. Where a petition against a county for damages alleges that a county ditch has been constructed through and across plaintiff's land, and the county in its answer admits that fact without pleading payment, a verdict for defendant is contrary to law. *Martin v. Fillmore County*, 719

10. Where chattels are injured by the negligence of another

Damages—concluded.

but not wholly destroyed, the measure of damages is the difference between the value of the property immediately before and immediately after the injury. *Chicago, B. & Q. R. Co. v. Metcalf* 848

11. One whose chattels have been injured by the negligence of another cannot charge the latter with the total value of the property by abandoning it. *Id.* 849

Death by Wrongful Act. See RAILROAD COMPANIES, 4.

Deceit.

1. In an action for deceit, the plaintiff must show that a direct and actual loss to him resulted from justifiably relying upon the false representations of defendant. *Lorenzen v. Kansas City Investment Co.* 99
2. Where plaintiff alleges in an action for damages that he disposed of his property below its value through false representations, the burden is on him to show that he was influenced by deceit and thereby induced to part with his property. *McCreedy v. Phillips* 790

Deeds. See TAX DEEDS.

Depositions.

Correctness of adverse ruling on a motion to strike from a deposition, during trial, an answer not previously objected to, on the ground that it stated a conclusion of the witness as to the effect of a conversation, instead of repeating the language used. *Woodworth v. Thompson* 311

Discrimination. See TELEGRAPH COMPANIES, 7.

Dismissal.

The right of plaintiff to dismiss the action at any time is not absolute, and the court may impose payment of costs as a condition precedent. *Sheedy v. McMurtry* 499

Distribution. See EXECUTIONS.

District Courts. See JUDGES.

Divorce.

1. The court has no jurisdiction to render a judgment for alimony against a non-resident husband who did not appear, where the only service upon him was by publication of notice. *Dillon v. Starin* 881
2. The provision of sec. 18, ch. 25, Comp. Stats., for restoring to the wife her property when she obtains a divorce, refers to property the law gives the husband by reason of the marriage and not to that obtained by him from her by gift or contract. *Id.*

Drainage. See COUNTIES, 2. EMINENT DOMAIN, 2.

Duress.

1. Where money is necessarily paid in order to obtain property illegally withheld, the transaction may be avoided on the ground of compulsion though not amounting to technical duress. *Fitzgerald v. Fitzgerald & Mallory Construction Co.*..... 465
Weber v. Kirkendall...... 766
2. Threats of prosecution and immediate imprisonment of a husband, which overcome the mind and will of himself and wife and induce them to sign a mortgage which they would not voluntarily have executed, constitute duress, and avoid the mortgage. *Hargreaves v. Korcek.*..... 660

Ecclesiastical Courts. See RELIGIOUS SOCIETIES.

Ejectment.

1. Objections to appraisers' report made under the occupying claimants act (ch. 63, Comp. Stats.), should be filed on or before the second day of the term of the district court next after the filing of the appraisal, where such report is made and filed in vacation. *Lothrop v. Michaelson.*... 633
2. The court may permit such objections to be filed out of time, but it is not reversible error to refuse so to do where no abuse of discretion is shown. *Id.*
3. The improvements must be appraised from a view of the premises. Appraisers have no authority to take the testimony of witnesses. *Id.*
4. The measure of recovery of an occupying claimant is the amount the real estate increased in value by reason of the improvements, and not the cost of making the same. *Id.*
5. Defendant may interpose any legal or equitable defense which negatives plaintiff's right of possession. *Wanser v. Lucas.*..... 759
6. The declarations of a former owner of land are not admissible as against those claiming under him when made after he has conveyed the land. *Consolidated Tank Line Co. v. Pien.*..... 887

Election. See MORTGAGES, 1.

Elections.

1. A student who resides at the seat of a university may vote there if otherwise qualified. *Berry v. Wilcox.*..... 82
2. Voting places of university students. *Id.*
3. Residence of students of a university. *Id.*

Elections—concluded.

4. An officer charged with the preparation of official ballots is allowed some discretion in the arrangement of party names. *Woods v. State*..... 430

Eminent Domain. See HIGHWAYS.

1. Competency of evidence of a witness who based his estimate of the value of land taken for railroad purposes on the value of other land, taking into consideration the cost of removing the difference in conditions. *Chicago, R. I. & P. R. Co. v. Griffith*..... 690
2. The owner of land appropriated by a county for a drainage ditch is entitled to recover the value of the land taken and any damage to the land not appropriated less special benefits to the latter. *Martin v. Fillmore County*, 719
3. To constitute an appropriation of land it is not necessary that the owner be deprived of the fee. *Id.*
4. Land is appropriated when it is so taken as to deprive the owner of the use thereof. *Id.*
5. It is only when the owner is not deprived of the occupancy of land, but merely suffers an incidental damage thereto because of the proximity of an improvement, that benefits may be set off against such damage. *Id.*

Equity. See DURESS. INJUNCTION. INSURANCE, 5. LACHES. PARTNERSHIP, 2, 7. SET-OFF, 1.

- Discussion of petition for an accounting in equity against a defaulting county treasurer and the sureties on his official bonds during two terms of office, and right of sureties to a jury trial. *Kuhl v. Pierce County* 584

Error Proceedings. See REVIEW.**Estoppel. See INSURANCE, 7, 31.**

1. An employe of a railroad company who accepts from the relief department benefits for an injury, under an agreement of membership releasing the company from liability in case of such acceptance, is estopped from suing for damages. *Chicago, B. & Q. R. Co. v. Bell* 45
2. In an action on an appeal bond the signers are estopped from making the defense that the appeal was not perfected. *Flannagan v. Cleveland*..... 58
3. A plaintiff who levies an attachment on property as that of defendant, cannot deny the latter's title. *Standard Stamping Co. v. Hetzel* 105
4. An attachment having been issued against a defendant, the plaintiff claiming to have acquired a lien by virtue of a

Estoppel—concluded.

- garnishment founded upon averments that the garnishee had property of the defendant in his possession, cannot be heard to insist that the defendant is without standing to move a discharge of the attachment because in fact he had no interest in the property. *Kilpatrick-Koch Dry Goods Co. v. Bremers*..... 863
5. The facts constituting an estoppel *in pais* must be pleaded. *Erickson v. First Nat. Bank of Oakland*..... 622
6. To create an estoppel *in pais* the party in whose favor the estoppel operates must have altered his position in reliance upon the words or conduct of the party estopped. *Lingonner v. Ambler*..... 316
7. A county will not be permitted to urge a state of facts, brought about by the neglect of the legal duties of its county board, to deprive the sureties on the county treasurer's official bond of their right to a jury trial. *Kuhl v. Pierce County*..... 584

Evidence. See ATTACHMENT, 1. CONFLICT OF LAWS. CORPORATIONS, 4. DAMAGES, 4. EJECTMENT, 6. EMINENT DOMAIN, 1. FRAUDULENT CONVEYANCES, 9, 10. INSURANCE, 5, 6, 28. LANDLORD AND TENANT, 1. NEW TRIAL, 1. PARTNERSHIP, 12. PLEADING, 9. RAPE. RATIFICATION. REPLEVIN, 1. USURY. WILLS, 2-4.

1. A letter identified as being in the handwriting of a party to the action may be admitted in evidence though the signature thereto is denied by the person charged with writing it. *Burgess v. Burgess*..... 16
2. In an action against a guarantor to recover the purchase price of goods, the terms of the written guaranty cannot be varied by parol evidence that the credit had been limited to a certain fixed period. *Maxwell v. Burr*..... 31
3. Whether a warrant of attorney is sufficient under the laws of another state to authorize the appearance entered thereunder, is a question to be determined from the evidence as to the laws of that state. *Snyder v. Critchfield*..... 66
4. The admission of a party sought to be charged that, at a certain time, he had a conversation in given terms by telephone, renders immaterial the objection that independently of such admission there was no direct evidence of the scope of such conversation. *Nebraska Nat. Bank v. Burke*..... 234
5. A certified copy of the record of a case in an appellate

Evidence—concluded.

- court is admissible to prove trial and judgment therein where those facts are in issue in another case. *Morrison v. Boggs*..... 248
6. Sufficiency of evidence to constitute abandonment of homestead where claimant voted while absent. *Corey v. Schuster*..... 270
7. The production of expert testimony is unnecessary in proving that a railroad company negligently constructed an embankment across a draw, causing surface water to flow upon farm lands to the damage of the owner. *Lincoln & B. H. R. Co. v. Sutherland* 526

Exceptions. See BILL OF EXCEPTIONS. TRIAL, 9, 12.

Executions. See APPEAL BONDS, 3. FACTORS AND BROKERS, 2. HOMESTEAD, 1. PARTNERSHIP, 4.

1. The proceeds of a sale of a defendant's goods under several executions, issued during the term of the district court at which the judgments were rendered therein, or within ten days thereafter, should be distributed *pro rata* among the execution creditors, though the writs were delivered to the sheriff on different days. *Moore v. Peycke*, 405
2. Where two or more executions against a debtor are delivered to the sheriff on the same day the proceeds of sale should be distributed *pro rata* among the execution creditors. *Id.*
3. In other cases the execution first delivered must be first satisfied. *Id.*

Exemplifications. See JUDGMENTS, 1.

Exemptions. See HOMESTEAD.

Factors and Brokers.

1. The relation of a factor for the sale of goods is that of a trustee for his principal. *National Cordage Co. v. Sims*.... 148
2. Property in the possession of a factor, to be sold for the benefit of his principal, is not liable to execution or attachment in satisfaction of the debts of the factor. *Id.*
3. Where a consignment is made to a commission merchant without instructions, the consignee's authority cannot be delegated, and must be exercised at the place to which the consignment was made. *Burke v. Frye* 223

False Representations. See DECEIT. INSURANCE, 28.

Fees. See COSTS. TAX DEEDS, 2.

Forcible Entry and Detainer.

1. Where a judgment of restitution is affirmed the signers of defendant's appeal bond are liable for costs, and the reasonable rent of the premises during the wrongful possession. Sec. 1030 of the Code fixes the measure of damages for which the signers of the bond are liable. *Morrison v. Boggs*..... 248
2. Sec. 1023 of the Code was enacted to provide a summary remedy to obtain possession of realty from one who unlawfully and forcibly entered and detained possession, or from one who, having lawfully entered, unlawfully and forcibly detained possession. *Blackford v. Frenzer*..... 829
3. The complaint need not aver facts which show that the defendant unlawfully and forcibly detains possession of the premises, but is sufficient when in the language of the statute. *Id.*

Foreign Judgments. See JUDGMENTS, 1-3.

Foreign Laws. See EVIDENCE, 3. STATUTES, 3, 4.

Forgery.

Variance between copy of instrument in the information and copy in the complaint. *Coffield v. State*..... 417

Frauds. See FRAUDULENT CONVEYANCES.

Fraudulent Conveyances.

1. An insolvent partnership may pay part of its creditors in full to the exclusion of others where such payment is made with an honest purpose. *Richards v. Leveille*..... 38
2. In an action by an attaching creditor to vacate a mortgage for fraud, evidence that it was not delivered until after levy of attachment is irrelevant where plaintiff alleges, and the answer admits, that the mortgage was delivered before the writ was levied. *First Nat. Bank of Wymore v. Myers*..... 306
3. In a contest between a vendee and vendor's creditors the burden is on the latter to show a fraudulent intent on part of the vendor and participation therein by vendee, where the vendee took immediate possession of goods under the conveyance and retained it. *Blumer v. Bennett*, 873
4. Where a sale of goods is not followed by a change of possession, the presumption is that it was made to hinder, delay, or defraud creditors of the seller, and in a contest with such creditors the burden is on the purchaser to prove that he purchased in good faith for value. *Snyder v. Dangler*..... 601

Fraudulent Conveyances—concluded.

5. A conveyance of goods for the purpose, on the part of the seller with knowledge of the buyer, of hindering, delaying, or defrauding creditors is void as to them, though the seller be solvent. *Id.*..... 602
6. All creditors of a seller, at any time the goods remained in his possession or under his control, are within the protection of the statute against fraudulent conveyances. *Id.*
7. A conveyance of land from a husband to his wife may be sustained when resting upon a sufficient money consideration. *Wanser v. Lucas*..... 759
8. Advancement of money to a husband by his wife out of her separate estate, *held*, under the evidence, to be a sufficient consideration for a conveyance of land. *Id.*
9. Where the effect of a conveyance from one relative to another is to deprive the vendor's creditors of their just dues, the transaction will be closely scrutinized. *Steinkraus v. Korth*..... 777
10. Evidence *held* sufficient to sustain a finding that a conveyance to a relative was made in fraud of the rights of vendor's creditors. *Id.*

Garnishment. See ESTOPPEL, 4. RECEIVERS.

Guaranty. See ALTERATION OF INSTRUMENTS EVIDENCE,
2. NEGOTIABLE INSTRUMENTS, 12.

1. Right of obligee to terminate a contract on account of default of the principal guarantor without notice, where the guaranty provides that the obligee may terminate the contract by giving sixty days' notice of an intention to annul the same for any reason other than the failure of the principal to perform any prescribed condition. *Korty v. McGill*..... 517
2. Under a building contract providing for certain payments on certificates of the architect as the work progresses, the contractor's guarantor is discharged from liability to the extent of payments made without the certificate of the architect. *O'Rourke v. Burke*..... 821

Herd Law. See ANIMALS.

Highways. See MUNICIPAL CORPORATIONS, 2. RAILROAD COMPANIES, 5-7.

The damages of a land owner for location of a highway should not be paid out of the county road fund, but must be paid from the fund of the road district where the highway is situated. *Palmer v. Vance*..... 348

Homestead. See INJUNCTION, 1.

1. A judgment at law against the owners of a homestead is an apparent lien upon the exempt premises and the cloud thereof may be removed in a suit by them for that purpose, though there has been no threat of execution. *Corey v. Schuster*..... 269
2. To constitute abandonment it must be shown that the parties removed from the homestead with the intention of not returning, or that they formed the intention of remaining away after the removal. *Id.*
3. Sufficiency of evidence to show abandonment where one removed from the homestead with the intention of returning and voted while absent. *Id.*
4. A two-story frame building may be a "dwelling-house" within the meaning of the homestead law where the claimant resides on the second floor and occupies the first floor for mercantile purposes. *Id.*

Horse Railways. See STREET RAILWAYS.

Husband and Wife. See FRAUDULENT CONVEYANCES, 7, 8.
MECHANICS' LIENS, 10. NEGOTIABLE INSTRUMENTS, 2.

- A petition alleging that a certain sum had come to the husband by reason of the marriage and praying restitution thereof is not supported by proof of money voluntarily advanced by the wife to the husband after the marriage. *Dillon v. Starin*..... 881

Improvements. See EJECTMENT, 1, 4.

Incorporation. See VILLAGES.

Indemnity. See PRINCIPAL AND SURETY, 9.

Indictment and Information. See CRIMINAL LAW, 3.
LIMITATION OF ACTIONS, 4.

Indorsements. See NEGOTIABLE INSTRUMENTS, 12.

Informations. See CRIMINAL LAW, 3.

Injunction. See RELIGIOUS SOCIETIES, 3.

1. An injunction to restrain judgment creditors from selling a homestead on execution should not be made perpetual for the reason that the claimants may abandon it or the premises may increase in value to an amount in excess of two thousand dollars. *Corey v. Schuster* 270
2. An action on a bond for a temporary injunction cannot be maintained until final adjudication of the case on its merits. *Browne v. Edwards*..... 361

Injunction—concluded.

3. Evidence in an action on an injunction bond *held* not to show termination of the suit. *Id.*
4. One not guilty of laches may invoke the aid of a court of equity to restrain the collection of a void tax. *Morris v. Merrell*..... 424
5. The collection or transfer of a note materially altered without the consent of the maker should not be enjoined by a court of equity. *Erickson v. First Nat. Bank of Oakland*..... 622
6. The fact that a maker is apprehensive that a witness by whom the former expects to establish a defense to a note may die or move away is not sufficient ground for enjoining the negotiation of the note. *Id.*
7. An injunction legally granted in a case where the court has jurisdiction must be respected until set aside by that court or reversed by an appellate court. *Wilber v. Woolley*, 739
8. One who knowingly disobeys an injunction which is not void, is liable to be punished for contempt, though the injunction ought to be set aside on motion to dissolve. *Id.*

Insanity. See WILLS, 2-4.

Insolvency. See PARTNERSHIP. PRINCIPAL AND SURETY,
7. SET-OFF, 1.

Instructions. See CRIMINAL LAW, 1, 2, 10. RAILROAD COMPANIES, 8. REVIEW, 8, 9.

1. An instruction stating a correct rule of law applicable to a certain class of testimony will be presumed upon review to be without error in the absence of a bill of exceptions. *Nelson v. Johnson*..... 7
2. An instruction that the jury may consider the interest of defendants in the result of the suit and give to their testimony only such weight as in the judgment of the jury it is entitled to, is not erroneous. *Barnby v. Wolfe*..... 77
3. Instructions must be considered together and not by detached paragraphs. *Stein v. Vannice*..... 132
4. The giving of an instruction on a matter not in issue which imposed upon the successful party an unnecessary burden is not ground for reversal where the party complaining was not prejudiced. *McClary v. Stall*..... 176
5. It is not required that each instruction shall state the different theories upon which the liability of the defendant may depend. *Nebraska Nat. Bank v. Burke*..... 234
6. An assignment of error in the supreme court as to giving

Instructions—concluded.

- a group of instructions will be considered no further than to ascertain that one of them was correctly given. *Houston v. City of Omaha*..... 65
- Schelly v. Schwank* 504
7. An assignment of error in the supreme court as to refusing a group of instructions asked will be considered no further than to ascertain that one of them was properly refused. *Id.*
8. The refusal to give an instruction requested cannot be reviewed in the absence of an exception. *Omaha Fire Ins. Co. v. Berg*..... 522
9. Error in an instruction which misstates the law is not cured by another instruction stating it correctly. *Richardson v. Halstead* 607
10. An obscure instruction may not be prejudicial where a clear one is given on the same subject. *Bingham v. Hartley*..... 682
11. The refusal to give an instruction requested is not reversible error where the principle of law stated therein has already been given. *Bushnell v. Chamberlain*..... 751
12. An instruction stating the issues should not contain a statement of matter not pleaded. *McCready v. Phillips*... 790
13. An instruction informing the jury that it may base a finding upon something not pleaded is erroneous. *Id.*
14. Oral instructions are erroneous unless written instructions are waived. *Erhlich v. State*..... 810
15. An instruction to find for plaintiff should be refused where the effect to be given certain evidence is therein misstated and made subordinate to propositions of fact with which it has no relation. *Vaughn v. Crites* 812
16. The statutory notation of "given" or "refused" on the margin of an instruction is part of the record, indicating the court's ruling; and an exception may be noted by a memorandum on the margin of the instruction. *Blumer v. Bennett*..... 873
17. Instructions given and refused are a part of the record and should not be embodied in a bill of exceptions. *Id.*

Instruments. See ALTERATION OF INSTRUMENTS.

Insurance. See CONTRACTS, 3.

1. Construction of the charter and by-laws of the National Masonic Accident Association of Des Moines, Iowa. *National Masonic Accident Association v. Burr* 256

Insurance—continued.

2. Under the circumstances stated in opinion it was *held* to be a question for the jury whether the evidence established the fact that an assessment remitted to a mutual accident association by a member was received before he was injured. *Id.*..... 257
3. The failure of a member of such a mutual accident association to pay an assessment when due does not oust him from membership, but suspends his right to claim indemnity for an injury received during the time he was in default. *Id.*..... 258
4. The retention by such an accident association of an assessment received after default in payment is not evidence of a waiver of the member's default. *Id.*
5. In a suit to reform an accident policy so as to make it conform to a verbal contract requiring insurer to pay one-third of the principal sum in case of the loss of a foot by the insured, circulars issued by the insurer before the policy was written, and brought to the attention of insured, are admissible in evidence where they show that the insurer issued policies containing such a provision. *Pacific Mutual Life Ins. Co. v. Frank* 320
6. In such a case the plaintiff may show by the circulars that the insurer held out its agent as authorized to write such policies to all persons. *Id.*
7. Where the insurer holds out its agent as authorized to write a policy it is estopped from denying his authority. *Id.*
8. A clause in a policy providing that the insurance shall be suspended during the non-payment of a premium note after maturity may be waived by the insurer. *Phoenix Ins. Co. v. Rollins* 745
9. After default by the insured, the company is entitled to recover the full amount of a premium note due in one year and given for a five-year policy containing a provision that the insurance shall be suspended during the non-payment of the note after maturity, but that a subsequent payment of the premium in full shall revive the policy for the full period. *Id.*
10. A misdescription, in a policy, of the land upon which insured personalty is situate does not release the insurer from liability for a loss, and reformation of the policy is not a condition precedent to suit. *Omaha Fire Ins. Co. v. Dufek*, 241
11. Where an insurer takes a risk with knowledge of other insurance on the same property, it is estopped from denying

Insurance—continued.

- liability on the ground that there was no memorandum of other insurance endorsed on its policy. *Home Fire Ins. Co. v. Hammang*..... 567
12. The provision of a policy prohibiting additional insurance may be waived by the insurer. *Eagle Fire Co. v. Globe Loan & Trust Co.*..... 380
13. Procuring additional insurance in violation of the provisions of a policy does not render the first policy void, but voidable. *Id.*
Home Fire Ins. Co. v. Hammang..... 567
14. An insurer may waive a provision prohibiting additional insurance by submitting to arbitration after loss. *Eagle Fire Co. v. Globe Loan & Trust Co.*..... 380
Home Fire Ins. Co. v. Hammang..... 568
15. An agent's knowledge of facts which render the contract voidable at the insurer's option, is knowledge of the company. *Eagle Fire Co. v. Globe Loan & Trust Co.*..... 381
Home Fire Ins. Co. v. Hammang 568
16. A statement by the insured to the insurer's agent that the former intends to take out additional insurance is not notice of such additional insurance. *Id.*
17. Sufficiency of affidavit set out in opinion to show proof of loss. *Rochester Loan & Banking Co. v. Liberty Ins. Co.*..... 537
18. Sufficiency of proof of loss set out in opinion. *Home Fire Ins. Co. v. Hammang*..... 568
19. Refusal of insurer to pay loss and denial of liability on the ground that the policy was not in force at the time of the fire, constitute a waiver of proofs of loss. *German Ins. & Savings Institution v. Kline*..... 395
Rochester Loan & Banking Co. v. Liberty Ins. Co...... 537
Home Fire Ins. Co. v. Hammang..... 568
20. A defect in proofs of loss is waived where the company fails to return them within a reasonable time with a statement pointing out the defect. *Home Fire Ins. Co. v. Hammang*..... 568
21. Where the insurer's adjusting agent, with knowledge of a loss, goes upon the grounds, examines into the circumstances of the fire, takes possession of the books and invoices of the insured, and helps to estimate the amount of damages, the provisions of the policy as to proofs of loss are waived. *Id.*
22. The question as to whether the insured at the date of the issuance of the policy was the owner of the insured prop-

Insurance—continued.

- erty is for the jury. *Rochester Loan & Banking Co. v. Liberty Ins. Co.*..... 538
23. To sustain a finding that a building destroyed was a total loss, it is not necessary for the evidence to show that the material was entirely consumed by fire. *Ins. Co. of North America v. Bachler*..... 550
24. Where there has been a total loss of insured realty, a provision of the policy limiting the amount of recovery to a sum less than that written is invalid. *Id.*..... 551
25. Sec. 45, ch. 43, Comp. Stats., providing for taxation of attorneys' fees, where judgment is entered against the insurer, is valid. *Id.*..... 550
26. If, by a loss, the holder of an interest in property is deprived of the possession, enjoyment, or profit thereof, or a security or lien resting thereon, or other certain benefits growing out of or depending upon such property, he has an insurable interest therein. *Rochester Loan & Banking Co. v. Liberty Ins. Co.*..... 538
27. A company issuing a policy without an application or an inquiry as to title, and accepting and retaining the premium, waives the right of forfeiture on account of the condition of the title to the property where the insured has an insurable interest. *German Ins. & Savings Institution v. Kline*..... 395
28. Where there is a lien on the property and no inquiries are made as to the condition of the title, acceptance of the policy by the insured is not a representation that the property is free from incumbrance. *Ins. Co. of North America v. Bachler* 550
29. Where insured is not questioned as to liens on the property, and does not intentionally conceal the facts, the existence of a mortgage does not invalidate the policy. *Id.*
30. Where a policy is issued to one who holds the legal title to the realty, no inquiries being made as to the interest of others therein, and the insured's only representation is that he owns the premises, it is not a defense in an action on the policy that the insured is a mere trustee for an undisclosed beneficiary. *Rochester Loan & Banking Co. v. Liberty Ins. Co.*..... 537
31. Where a company insures property with knowledge that it is vacant, it is estopped after loss from denying liability under a provision invalidating the policy for such vacancy. *Id.*

Insurance—concluded.

32. Knowledge of an agent that the property was vacant when insured is knowledge of the company. *Id.*
33. Failure of insured to comply with an arbitration clause is not a defense in an action on a policy to recover for a loss. *National Masonic Accident Association v. Burr*..... 258
Ins. Co. of North America v. Bachler..... 550
34. The validity of a provision of a policy requiring an officer's certificate of insured's moral character and financial standing to be furnished as a condition precedent to suit, is doubtful. *Home Fire Ins. Co. v. Hammang* 565

Interest.

1. Rate allowable to plaintiff on foreclosure of a valid tax sale certificate. *Osgood v. Grant*..... 350
2. Where plaintiff recovers in an action against his co-sureties to enforce contribution, he is entitled to interest on the amount paid by him from the date of payment. *Smith v. Mason* 610

Intervention. See APPEAL, 5.

Intoxicating Liquors.

1. Where it was shown *inter alia* that a section foreman drank whiskey at a saloon, became intoxicated, started home on his hand car, and was run down and killed by a train, it was *held* proper to submit to the jury the question whether the liquor furnished by the saloon-keeper contributed to the fatal result so as to render the latter liable in an action by the widow of deceased. *Cornelius v. Hultman*..... 441
2. On the evidence adduced under proper pleadings in the case, it was *held* that the drunkenness of deceased was the primary cause of the fatal accident, and that the court did not err in refusing to submit to the jury the question of the negligence of the railroad company. *Id.*..... 442
3. Evidence *held* sufficient to sustain a judgment against the saloon-keeper. *Id.*

Judges.

1. A judge of the district court has no power at chambers except that conferred by statute. *Browne v. Edwards*..... 381
2. A judge of the district court at chambers has no authority to enter a final order in an injunction suit. *Id.*

Judgments. See APPEAL BONDS, 3. COSTS, 3. HOMESTEAD,

1. REPLEVIN, 3. RES ADJUDICATA.

1. A judgment of a court of another state, authenticated ac-

Judgments—concluded.

- according to the act of congress is conclusive upon the subject-matter of the suit. *Snyder v. Critchfield*..... 66
2. An action on a foreign judgment properly authenticated can only be defeated on the ground that the court was without jurisdiction, that there was fraud in procuring the judgment, or by defenses based on matters arising after entry of judgment. *Id.*
 3. A foreign judgment entered on a warrant of attorney in a state where such a judgment is authorized, has the same force, when sued on, as a judgment on adversary proceedings. *Id.*
 4. The power of a district court to modify its judgments after term is limited to the grounds enumerated in sec. 602 of the Code. *Barnes v. Hale*..... 355
 5. The filing and docketing of transcriptive judgments of inferior courts in the district court do not make them judgments of that court. *Moore v. Peycke*..... 406
 6. Upon the record discussed in opinion the judgment was held to be one against a firm and not against the individual members thereof. *Broatch v. Moore*..... 640

Judicial Sales.

1. Objections to confirmation must be specifically assigned in the motion to vacate the sale. *Ecklund v. Willis*..... 129
2. The appraised value of the property can only be assailed for fraud. *Id.*
3. Objection that the property was appraised too high should be made and filed with a motion to vacate the appraisal before the land is sold. *Id.*

Jurisdiction. See COURTS. DIVORCE, 1. JUSTICE OF THE PEACE, 3. MORTGAGES, 4. REMOVAL OF CAUSES.

Jury. See NEW TRIAL, 3-5. REVIEW, 4.

Jury Trial. See REFERENCE.

Justice of the Peace. See APPEAL, 6.

1. A justice of the peace has no authority to settle a bill of exceptions. *Vlasek v. Wilson*..... 10
2. No fee is allowable to a sheriff or constable for attendance during the trial of a civil case before a justice of the peace. *Kissinger v. Staley*..... 784
3. A justice of the peace has jurisdiction in an action to recover possession of realty under sec. 1023 of the Code. *Blachford v. Frenzer*..... 829

Laches.

Mere lapse of time will not bar the right to rescind a voidable transaction. *Fitzgerald v. Fitzgerald & Mallory Construction Co.*..... 465

Landlord and Tenant. See VENDOR AND VENDEE.

1. Where a tenant is not obligated by his lease to make repairs, a subsequent parol agreement, whereby repairs are agreed upon, the landlord promising to pay the cost thereof above a certain sum, is valid. *Woodworth v. Thompson* ... 311
2. In such a case, the making of the repairs by the tenant, and his promise to pay a portion of the cost, constitute a sufficient consideration for the landlord's promise. *Id.*
3. A requirement in a lease that the lessee shall make cash repairs to a specified amount confers no right of charging the landlord or his property with the cost of such repairs. *Schrage v. Miller*..... 818
4. A subtenant is charged with notice of the existence of the tenant's lease and is bound by its terms and conditions. *Blachford v. Frenzer*.... 829
5. A landlord by accepting without objection the possession of leased premises waives his right to insist upon thirty days' notice of the tenant's intention to quit. *Elgutter v. Drishaus* 378
6. As between a tenant for years and the purchaser of the land at sheriff's sale, the former is entitled to a crop grown pending mortgage foreclosure and harvested after confirmation of the sale, where the tenant remained in possession and was notified that the purchaser expected a money rent or a portion of the crop. *Monday v. O'Neil*..... 724

Larceny.

Where the owner of the property is examined as a witness, his testimony that the property was taken without his consent is indispensable to a conviction. *Perry v. State*... 414

Lease. See LANDLORD AND TENANT, 4.

Letters. See EVIDENCE, 1.

Libel and Slander.

1. An action for slander may be maintained against one who falsely said of plaintiff that she is a prostitute, without allegations or proof of special damages. *Barr v. Birkner*, 197
2. Where defendant pleads that he uttered the words charged but denies that they were intended to convey the meaning averred in the petition, his answer is not a denial that the words imputed the meaning alleged by plaintiff. *Id.*, 198

Libel and Slander—concluded.

3. Under the evidence introduced a direction to find for defendant was *held* erroneous. *Id.*

Liens. See ATTACHMENT, 4. ATTORNEYS' LIENS. JUDGMENTS. MORTGAGES. PARTNERSHIP, 6. REPLEVIN, 1.

Limitation of Actions. See APPEAL, 2. LACHES. TELEGRAPH COMPANIES, 2.

1. An action on a judgment of a court of Pennsylvania entered on a warrant of attorney cannot be defeated on the ground that the statute had run upon the original cause of action before entry of judgment. *Snyder v. Critchfield*..... 72
2. Under sec. 21, Code, an action is barred in Nebraska when defendant has resided in another state for the full period of limitation under the laws of that state, though the cause of action arose in Nebraska, where defendant resided at the time it arose. *Webster v. Davies*..... 301
3. The statute of limitations relating to the foreclosure of tax liens is no bar to the recovery of taxes under the provisions of the occupying claimants' act. *Lothrop v. Michaelson*..... 633
4. Under sec. 256, Criminal Code, an indictment or information must be filed within the statutory period. Complaint, arrest, and preliminary examination do not prevent the running of the statute. *Boughs v. State*..... 880

Live Stock. See ANIMALS.

Mandamus.

1. *Mandamus* proceedings are actions at law and can only be reviewed on error. *State v. Affholder*..... 497
2. *Mandamus* will not lie to control the discretion of a county clerk in the arrangement of party names upon official ballots. *Woods v. State*..... 431

Manufacturing Companies. See CORPORATIONS, 1-3.

Master and Servant.

A master is not liable for the acts of his servant committed outside the line of his duty and not connected with the master's business. *Western Union Telegraph Co. v. Mullins*, 732

Measure of Damages. See DAMAGES.

Mechanics' Liens. See LANDLORD AND TENANT, 3.

1. Right of a material-man, who agreed not to assert a claim for a lien, to purchase and enforce the claim of another. *Hines v. Cochran*..... 12
2. Decree establishing a mechanic's lien for sinking a well

Mechanics' Liens—concluded.

- reversed because of a failure on the part of the contractor to show full performance of his contract. *Omaha Consolidated Vinegar Co. v. Burns*..... 30
3. The question as to the right of a mechanic to a lien for sinking a well is not decided. *Id.*
4. Sufficiency of claim for a lien and right of a subcontractor who painted two houses under one contract to have a separate lien on one house. *Hines v. Cochran*..... 12
5. One who furnishes material for all the buildings on several lots, under one contract, cannot make the entire debt a charge upon a portion of the land, but may make it a charge upon all. *Badger Lumber Co. v. Holmes*..... 244
6. One who furnishes material for all the buildings on several lots under one contract cannot have a separate lien on a portion of the land without showing the value of the material actually used in the buildings on such portion. *Id.*
7. Where a mortgage was recorded August 21, 1890, and it was alleged in a claim for a mechanic's lien on the same property that the material was furnished between August 21, 1890 and January 22, 1891, the mortgage was *held* to be the superior lien. *Weir v. Thomas*..... 507
8. A material-man should not be allowed to tack one contract to another and thereby procure a lien for all the material furnished under both by filing an itemized account within four months of the date of furnishing the last item of material under the last contract. *Central Loan & Trust Co. v. O'Sullivan*..... 835
9. The evidence justified a finding that material was furnished under separate contracts in a case where part of the items was delivered on or prior to May 27, and the balance was not furnished until August 20, or later. *Id.*, 834
10. Evidence *held* to sustain a finding that material for which plaintiff claimed a lien against a wife's property was furnished to the husband individually, and not as agent for the wife or on the faith and credit of her real estate. *Id.*, 835
11. Affirmance of decree establishing plaintiff's lien where the evidence was conflicting and the defense was that plaintiff used improper material and failed to complete the building within the time fixed by the contract. *Pearsall v. Columbus Creamery Co.*..... 833

Metropolitan Cities. See ANIMALS, 1.

Misconduct of Jury. See NEW TRIAL, 3-5. REVIEW, 23.

Mortgages. See JUDICIAL SALES. LANDLORD AND TENANT, 6.
MECHANICS' LIENS, 7. NEGOTIABLE INSTRUMENTS, 9.
PRINCIPAL AND AGENT, 4.

1. A mortgagee may either sue at law for the recovery of the debt or foreclose the mortgage, but when he elects as to his cause of action he must exhaust the remedy chosen before resorting to the other. *Meehan v. First Nat. Bank of Fairfield*..... 213
2. A mortgagee, pending foreclosure or after judgment, cannot, without consent of the court of equity, enforce payment of the debt in an action at law on the obligation of a person other than mortgagor. *Id.*
3. In such an action at law plaintiff should allege and prove his authority to bring the suit. *Id.*..... 214
4. A mortgagee who indorsed the notes secured is liable for payment. He is a proper party to a foreclosure suit and cannot be sued at law as an indorser pending foreclosure or after judgment without permission of the court of equity. *Id.*
5. Evidence of plaintiff's title to security under indorsements and a will, in an action to foreclose a mortgage. *Stark v. Olsen*..... 647
6. Sec. 39, ch. 73, Comp. Stats., providing that the recording of an assignment of a mortgage shall not be deemed notice to the mortgagor so as to invalidate payments made by him to the mortgagee, has no application to the holder of negotiable securities whose title was acquired before maturity for value in the usual course of business. *Id.*... 648
7. Sufficiency of evidence to show that a mortgage was executed by a husband and wife under duress. *Hargreaves v. Korcek*..... 660

Municipal Corporations. See VILLAGES.

1. The herd law applies to cultivated lands within a metropolitan city, though there is a city ordinance providing for impounding animals. *Lingonner v. Ambler*..... 316
2. The provision of sec. 49, ch. 14, Laws, 1889, providing that the road taxes collected from property in cities of the first class shall be paid to the city treasurer and expended as the council may direct, has reference merely to such taxes as are by general law collected for the use of the city as a road district. *State v. Cobb*..... 434
3. Whether a particular piece of land lies within or without the corporate limits of a municipality is a question for judicial determination. *City of Hastings v. Hansen*..... 704

Municipal Corporations—concluded.

4. The power to create municipal corporations and enlarge or restrict their boundaries is legislative. *Id.*
5. In the absence of statutory authority courts have no jurisdiction to disconnect by decree any part of municipal territory at the suit of the owner thereof. *Id.*
6. Sec. 101, ch. 14, Comp. Stats., providing a means for disconnecting municipal territory does not apply to cities of the first class having less than twenty-five thousand inhabitants. *Id.*

Mutual Accident Associations. See INSURANCE, 1-4.

Negligence. See CARRIERS. DAMAGES, 3, 7-11. INTOXICATING LIQUORS. RAILROAD COMPANIES. TELEGRAPH COMPANIES, 3, 4.

1. The question of negligence was *held* to be for the jury in a case where a passenger was forced, by the pressure of the crowd, from the front step of a street railway car and injured. *Pray v. Omaha Street R. Co.*..... 167
2. Sufficiency of evidence in an action against a street railway company to recover for personal injuries. *Omaha Street R. Co. v. Baker* 511

Negotiable Instruments. See ALTERATION OF INSTRUMENTS, 5. INJUNCTION, 5, 6. MORTGAGES, 4, 6. USURY.

1. In Pennsylvania the assignee of a note containing a warrant of attorney may have judgment entered in his favor. *Snyder v. Critchfield*..... 67
2. In an action on a note against a husband and wife, involving the question of his authority to sign her name, the evidence was *held* sufficient to sustain a verdict against the husband, but insufficient to sustain a verdict against the wife. *Barmby v. Wolfe*..... 77
3. Where a note is valid as between the original parties, a pledgee may recover the whole amount thereof, retaining any surplus as trustee for the party beneficially entitled to it. *Id.*
4. Where a note is invalid as between the original parties, a *bona fide* pledgee may only recover the amount of his advances, provided there is no other party in interest. *Id.*
5. In an action by the endorsee of a negotiable note transferred before maturity, the maker, in order to avail himself of the defense of payment before endorsement, must plead and prove that plaintiff had notice of the payment

Negotiable Instruments—concluded.

- before the note was transferred. *Yenney v. Central City Bank*..... 402
- 6. In an action on a promissory note by an alleged indorsee thereof, a denial of the indorsement and plaintiff's ownership is a good defense. *Central City Bank v. Rice*..... 594
- 7. Evidence in such a case held sufficient to support a verdict for defendant. *Id.*
- 8. The maker's ratification of a note after a material alteration must be pleaded when relied upon by the holder of the note. *Erickson v. First Nat. Bank of Oakland*..... 632
- 9. Where a mortgage of land in Nebraska is there executed and delivered to secure a note appearing from its face to have been twelve days previously executed in Iowa to a loan broker of that state, the presumption is, in the absence of explanatory evidence, that payment of the proceeds of the loan and delivery of the note and mortgage were contemporaneous acts, and that the note is not an Iowa contract. *Stark v. Olsen*..... 647
- 10. A note is not rendered non-negotiable by a provision for payment of an attorney's fee in case suit is brought to enforce collection. *Id.*
- 11. A note is not rendered non-negotiable by a provision allowing the holder to declare the debt due in case of default in a payment of interest. *Id.*
- 12. The agreement, "For value received we hereby guaranty payment of the within note at maturity, or any time thereafter, waiving protest and notice of non-payment," is not a mere guaranty, but an indorsement with an enlarged liability. *Pollard v. Huff*..... 892
- 13. An accommodation note or bill is one not made or accepted upon a consideration, but for the purpose of enabling the payee or holder to raise money on credit. *Id.*

New Trial. See REVIEW, 13, 17, 23.

- 1. Where a motion for a new trial is made on behalf of a person on the grounds that he was not made a party and that counsel appeared for him without authority and failed to make a proper defense, the court in passing upon the motion may consider matters of record which occurred during the trial. *Spotswood v. Nat. Bank of Commerce*.... 1
- 2. An attorney who is unprepared for trial when his case is called will not be permitted to urge on motion for a new trial matters of which he had knowledge and failed to

New Trial—concluded.

- present in support of his application for a postponement.
Corbett v. Nat. Bank of Commerce..... 230
3. Where members of a jury discuss among themselves the merits of the case, express opinions before the final submission, and, during deliberation, communicate with one of the attorneys, their verdict may be set aside. *Edney v. Baum*..... 294
4. It will usually be presumed that prejudice results from communication, during deliberations of jury, between an attorney in the case and a juror. *Id.*
5. The existence of an opportunity and inclination among jurors to communicate with those outside the jury room may be sufficient to vitiate a verdict. *Id.*
6. Primarily the office of a motion for a new trial is to afford the court an opportunity to correct errors in its own proceedings. *Weber v. Kirkendall*..... 766

Notes. See INSURANCE, 9. NEGOTIABLE INSTRUMENTS.

Notice. See INSURANCE, 31. TRUSTS, 2.

Objections. See TRIAL, 9-13.

Occupying Claimants. See EJECTMENT, 1-4.

Opening and Closing. See TRIAL, 2.

Overruled Cases. See TABLE, *ante*, p. lvii.

Parties. See MORTGAGES, 4. PARTNERSHIP, 7. QUO WARRANTO.

1. Objection on account of the absence of parties not indispensable to a determination of a controversy should be made by answer or demurrer, otherwise the court may determine the rights of the parties before it. *Fitzgerald v. Fitzgerald & Mallory Construction Co*..... 465
2. Only such persons as are bound by a judgment are necessary parties to a proceeding in error. *Kuhl v. Pierce County*... 594

Partnership. See ATTACHMENT, 1.

1. Accounting. *Richardson v. Doty*..... 73
2. A court of equity, in a proper case, may apply the assets of an insolvent copartnership to the payment of the firm debts to the exclusion of the debts of the individual partners. *Richards v. Lereille*..... 38
3. A partnership is a distinct entity, having its own property, debts, and credits. For the purposes for which it is created it is a person, and as such is recognized by law. *Id.*

Partnership—concluded.

4. Partnership assets may be levied upon and sold for the payment of the debts of all the individual members of the partnership, and such sale will not be invalid because the debt was that of the individual members of the firm. *Id.*
5. The assets of a partnership, though insolvent, are not held in trust by the members of the firm for the payment of partnership debts. *Id.*
6. The firm creditors, as such, are not given a lien by law upon the assets of the partnership, whether the firm be solvent or insolvent. *Id.*..... 39
7. It is only in a proper action, by a member of an insolvent firm or a creditor thereof, that the assets are first applied by a court of equity to the payment of partnership debts. *Id.*
8. On dissolution of an insolvent partnership, its assets will, in a court of equity, be treated as a trust fund for payment of partnership debts. *Perkins v. Butler County.*..... 110
9. An assignment of partnership funds, made by one member of an insolvent firm to secure his individual debt, is subject to the payment of the partnership debts, and in the distribution of the fund the partnership creditors will be first paid, notwithstanding such assignment. *Id.*
10. Where defendant denies liability as a partner, plaintiff, in order to recover against him as such, must prove a partnership in fact, or that defendant permitted himself to be held out as a partner. *McDonald v. Jenkins.*..... 163
11. Evidence *held* not to sustain the allegation of partnership. *Id.*
12. Mere statements of one claiming to act for, and as a member of, a firm are not competent to establish a disputed partnership relation. *Weeks v. Palmer Deposit Bank.*..... 684
13. On the record discussed in the opinion the judgment was *held* to be one against the firm and not against the individuals. *Broatch v. Moore.*..... 640

Payment. See DURESS, 1. NEGOTIABLE INSTRUMENTS, 5.
 PRINCIPAL AND AGENT, 4. PRINCIPAL AND SURETY, 6.

1. A debt will not be extinguished by the payment of a less sum than the amount actually due, unless based upon a new and sufficient consideration. *Fitzgerald v. Fitzgerald & Mallory Construction Co.*..... 464
2. One threatened with civil process, unaccompanied by any act of hardship or oppression, is required to make his de-

Payment—concluded.

fense in the first instance to the merits of the claim, and cannot postpone litigation by paying the demand and afterward maintain an action therefor. *Weber v. Kirkendall*... 766

Penalty. See BONDS.

Personal Injuries. See DAMAGES. NEGLIGENCE. TORTS.

Pleading. See CONTRACTS, 5. CORPORATIONS, 4. HUSBAND AND WIFE. LIBEL AND SLANDER, 1, 2. MORTGAGES, 2, 3. NEGOTIABLE INSTRUMENTS, 8. PRINCIPAL AND SURETY, 8. USURY.

1. The *allegata et probata* must agree. *Omaha Consolidated Vinegar Co. v. Burns*..... 21
2. Sufficiency of allegation to admit proof of defective braking apparatus of a car in an action for personal injuries. *St. Joseph & G. I. R. Co. v. Hedge*..... 449
3. Courts should refuse to direct what language must be employed in drafting pleadings. *Omaha Fire Ins. Co. v. Berg*... 523
4. Error does not appear in an order overruling a motion to strike out portions of a petition unless prejudice results. *Id.*..... 522
5. Sufficiency of petition for an accounting in equity in an action by a county against a defaulting county treasurer and the sureties on his official bonds. *Kuhl v. Pierce County*, 584
6. Amendment of a pleading to conform it to the facts proved may be allowed where it does not change the cause of action or defense. (Code, sec. 144.) *Scott v. Spencer*.... 93
7. Amendments should not be allowed after judgment where they change the nature of the action or defense. *Id.*
First Nat. Bank of Wymore v. Myers..... 307
8. Amendments will not be allowed when to do so would prejudice the rights of the adverse party. *Id.*
9. Where an amended pleading has been filed the original loses its force and the adverse party should not read it to the jury or comment upon it in argument without first offering it in evidence. *Woodworth v. Thompson*..... 311
10. Rulings on motions for leave to amend pleadings will not be reversed except for an abuse of discretion where prejudice results. *Central City Bank v. Rice*..... 594
11. Where a petition states a case entitling the plaintiff to judgment for any amount, it is good against demurrer, or an objection to the introduction of evidence on the ground that it does not state a cause of action. *Western Union Telegraph Co. v. Mullins*. 732

Pleading—concluded.

12. The rule requiring the pleader to state the facts constituting a cause of action or defense should not be applied to complaints in forcible detainer actions under sec. 1023 of the Code. *Blackford v. Frenzer*..... 829

Pledges. See NEGOTIABLE INSTRUMENTS, 3, 4.

Possession. See TRESPASS.

Powers. See TRUSTS.

Practice. See APPEAL, 6. ATTACHMENT, 3. CRIMINAL LAW, 12. DISMISSAL. EJECTMENT, 1, 2. JUDICIAL SALES, 3. REMOVAL OF CAUSES. REVIEW, 18.

Preliminary Examination. See CRIMINAL LAW, 4-7.

Principal and Agent. See INSURANCE, 5-7, 15, 32. MECHANICS' LIENS, 10.

1. Where a contract provides that a consignee shall receive goods for sale on commission and return periodically to the consignor the proceeds at prices charged by the latter, the former guarantying payment, the relation the law implies is that of agency. *National Cordage Co. v. Sims* 148
2. The fact of agency cannot be established by the mere declarations of one assuming to act as agent. *Burke v. Frye*, 223
3. Acquiescence by a principal in the fraudulent or unauthorized act of his agent is in effect a new agreement made with an intent to condone the wrong done and will not be inferred from doubtful evidence. *Fitzgerald v. Fitzgerald & Mallory Construction Co.*..... 465
4. Agency with power to satisfy a mortgage before maturity will not be presumed, as against a *bona fide* holder, from the mere fact that the mortgagee, who sold the security, forwarded to his correspondent, at whose office it was payable, funds for the satisfaction of interest coupons. *Stark v. Olsen*..... 648

Principal and Surety. See GUARANTY, 2.

1. The liability of the signers of an appeal bond, as between them and the judgment creditor, is that of principal debtors. *Flannagan v. Cleveland*..... 62
2. A principal in a proposed bond, by a statement to the proposed obligee's agent as to the necessity of paying a debt, for which the proposed sureties are liable to a third person, before requesting them to again become sureties, does not make such payment an indispensable condition precedent to the acceptance of the proposed bond by the obligee named therein. *Ko. ty v. McGill*..... 516

Principal and Surety—concluded.

3. Where the principal has paid for all goods bought before execution of a bond guarantying payment of all purchases by him, purchases before execution of the bond are immaterial to the liability of the sureties for goods sold the principal after they sign the bond. *Id.*
4. A bond of guaranty for payment of goods purchased requiring the obligee to give the principal a credit of sixty days, is not inoperative against the sureties because the obligee takes notes without reference to the limitation of sixty days, where the taking of such notes is, in general terms, authorized by the bond. *Id.*..... 517
5. Right of sureties on the bond of a defaulting county treasurer to a jury trial. *Kuhl v. Pierce County* 584
6. A surety who discharges the debt by giving his note for the amount due may enforce contribution from his co-sureties without payment of the note where it is accepted by the creditor. *Smith v. Mason.*..... 610
7. In an action by a surety against his co-sureties for contribution, the burden must be distributed equally among the solvent sureties, excluding those who are insolvent. *Id.*
8. Allegations and proof of insolvency of the principal debtor are unnecessary in order to recover contribution. *Id.*..... 611
9. The mere refusal of a surety to accept property from the principal as indemnity will not defeat his right to contribution where he has paid the original debt. *Id.*
10. In an action for contribution plaintiff is entitled to interest on the amount paid by him from the date of payment. *Id.*
11. Failure to sue the principal debtor when the debt becomes due, or an agreement without consideration between a creditor and the principal debtor for an extension of time for payment, does not release the sureties. *Id.*

Probate. See WILLS.

Public Policy. See CONTRACTS, 6.

Validity of contract discussed in opinion. *Fitzgerald v. Fitzgerald & Mallory Construction Co.*..... 464

Quieting Title. See HOMESTEAD, 1.

1. Case where an effort was made to cancel a claim for a mechanic's lien for sinking a well. *Omaha Consolidated Vinegar Co. v. Burns.*..... 21
2. Where plaintiff's title is put in issue by the answer, he must show that he owns the legal or equitable title, or that

Quieting Title—concluded.

he has an interest in the land superior to that of defendant. *McCauley v. Ohenstein*..... 89

3. Question relating to the sufficiency of evidence to entitle plaintiff to a decree canceling a contract of sale as being a cloud on plaintiff's title. *Warnick v. Latta*..... 807

Quo Warranto.

The owner of agricultural lands illegally included within a city or village, who is not a voter therein, may proceed by *quo warranto* to test the validity of the incorporation. *State v. Dimond*..... 155

Railroad Companies. See CORPORATIONS, 4. INTOXICATING LIQUORS, 1, 2. STREET RAILWAYS.

1. Sufficiency of evidence to show that a railroad company negligently constructed an embankment across a draw and that damage to farm land resulted from the flow of surface water. *Lincoln & B. H. R. Co. v. Sutherland*..... 528
2. In an action under sec 3, art 1, ch. 72, Comp. Stats., to recover for injuries received while plaintiff was a passenger on a railroad, it is sufficient for him to prove that the injuries resulted from the operation and management of the road. *St. Joseph & G. I. R. Co. v. Hedge*..... 448
3. In such a case the law infers negligence from the fact of the injury and imposes upon defendant the burden of proving that the injury resulted from plaintiff's negligence, or a violation of a rule of the company. *Id.*
4. In an action by an administratrix against a railroad company for negligently causing the death of her husband, the evidence was *held* sufficient to sustain a finding that the proximate cause of the death of deceased was his own negligence. *Swindell v. Chicago, B. & Q. R. Co.*..... 841
5. Sec. 104, ch. 16, Comp. Stats., requiring railroad companies to ring a bell or sound a whistle at public crossings applies to roads used by the public, though not dedicated as such. *Chicago, B. & Q. R. Co. v. Metcalf*..... 848
6. Sec. 104, ch. 16, Comp. Stats., requiring railroad companies to give signals at public crossings, was intended to protect all persons lawfully at or near a crossing from any danger naturally to be apprehended from the sudden approach without warning of a train. *Id.*
7. A person with a team, unloading a car at a station near a crossing, is within the protection of the statute requiring signals at crossings. *Id.*

Railroad Companies—concluded.

8. In an action to recover damages resulting from the failure of a railroad company to ring a bell or sound a whistle at a crossing, it is error to instruct the jury that the company is liable if it failed to give the signal required by statute, provided the injury was caused in consequence of such omission. *Id.*

Rape.

1. Evidence that prosecutrix was but sixteen years of age, simple-minded, and had suffered a physical injury partially depriving her of strength, may be considered by the jury in determining whether the resistance by her was sufficient to show non-consent. *Thompson v. State* 366
2. Evidence in the case *held* sufficient to sustain a conviction. *Id.*
3. Evidence *held* insufficient to sustain a conviction. *George v. State*..... 757

Ratification. See NEGOTIABLE INSTRUMENTS, 8. PRINCIPAL AND AGENT, 3.

1. Evidence as to whether a wife ratified the act of her husband in signing her name to a note. *Barmby v. Wolfe* 81
2. Ratification of a loan of corporate bonds by receiving them and paying interest thereon. *Fitzgerald v. Fitzgerald & Mallory Construction Co.*..... 464
3. The failure of the injured party to object after knowledge of the wrong is evidence of ratification. *Fitzgerald v. Fitzgerald & Mallory Construction Co.*..... 465

Real Estate. See EJECTMENT.

Receivers.

It is no objection to the appointment of a receiver of a corporation, in an action by a stockholder for an accounting in its behalf against a corporation indebted to it, that the debtor corporation was summoned as garnishee of the first named corporation in an action against it by attachment, where the attachment proceeding has been abandoned and judgment entered for damages only, without any reference to the garnishee. *Fitzgerald v. Fitzgerald & Mallory Construction Co.* 465

Records. See EVIDENCE, 5.

Reference.

A legal action cannot be referred except by consent of parties. *Kuhl v. Pierce County*..... 584

Reformation of Instruments. See INSURANCE, 10.

Register of Deeds.

It is the duty of the register of deeds to record tax deeds when presented for that purpose, accompanied by the lawful fee.

Burnham v. State..... 438

Registration. See MORTGAGES, 6. SALES, 2.

Release and Discharge.

1. In absence of fraud or mistake an employe of a railroad company who accepts from the relief department benefits for an injury under an agreement of membership releasing the company from liability in case of such acceptance, cannot recover in an action against the company for damages resulting from the injury. *Chicago, B. & Q. R. Co. v. Bell*..... 45
2. An arbitrary refusal to pay, based on the mere pretense of the debtor, made for the purpose of exacting terms which are inequitable and oppressive, is not such a dispute as will of itself support a compromise resulting in a reduction of the amount of the indebtedness. *Fitzgerald v. Fitzgerald & Mallory Construction Co.*..... 463

Relief Departments. See CONTRACTS, 3.

Religious Societies.

1. A church which is a member of an association of congregations governed by the same rules, is bound by the decisions of the association relating to church government and discipline. *Pounder v. Ashe*..... 672
2. Civil courts will not review the proceedings of church tribunals relating to organization, government, and discipline. *Id.*
3. Where the highest church tribunal has deposed a clergyman and expelled him from membership, the judgment may be enforced by a court of equity, and the clergyman may be enjoined from performing his ministerial functions. *Id.*

Removal of Causes.

A state court should not examine the proceedings of the circuit court of the United States to determine whether an order remanding a cause for want of jurisdiction is in accordance with the practice of the circuit court. *Fitzgerald v. Fitzgerald & Mallory Construction Co.*..... 465

Replevin.

1. Allegation of general ownership is not supported by proof of a mere lien. *Sharp v. Johnson*..... 165
2. Direction of verdict for plaintiff held proper under the evi-

Replevin—concluded.

- dence in an action to recover some oats. *Mawhinney v. Green*..... 689
3. Where defendant recovers judgment for the withholding of the property and costs, plaintiff cannot complain that judgment was not rendered against the latter for a return of the property or the value thereof. *Scott v. Burrill* 755
4. Discussion of question as to vendor's right to replevy a house moved from a lot sold by him, where vendee made default under a contract authorizing the vendor to take immediate possession in case the vendee failed to make a payment when due. *Ellsworth v. McDowell*..... 707
5. The plaintiff must prove ownership, right of immediate possession thereof, and wrongful detention by defendant. *Peterson v. Lodwick*..... 771
6. It must be shown that the facts necessary to plaintiff's recovery existed at the time suit was brought. *Id.*
7. The court may direct a verdict for defendant where plaintiff fails to prove sufficient facts to entitle him to recover. *Id.*

Res Adjudicata.

1. Damages resulting from negligence of a lienor in caring for stock taken up by him under the herd law are not barred by a statutory arbitration, assessment of damages and payment of award. *Richardson v. Halstead*..... 606
2. Where issues have been determined by a decree and the case reserved for an accounting, they cannot be relitigated in the supplemental proceedings. *Younkin v. Younkin* ... 729

Residence. See ELECTIONS, 1-3.

Review. See APPEAL. BILL OF EXCEPTIONS. CONTINUANCE, 1. COSTS, 1. CRIMINAL LAW. INSTRUCTIONS. JUDGMENTS, 4. PARTIES, 1. PLEADING, 4, 10. RELIGIOUS SOCIETIES, 1, 2. TRIAL. WITNESSES, 2, 3.

1. Every presumption is in favor of the correctness of the rulings of the trial court. *Spotswood v. Nat. Bank of Commerce* 6
2. Where plaintiff's right to recover below was not affirmatively established by the proofs a judgment for defendant will be affirmed. *Windsor v. Thompson* 228
3. A verdict should not be set aside because of inadequacy of damages awarded, when on one issue, if found for plaintiff, they would be inadequate, but when the verdict

Review—continued.

- may have been based on other issues calling for a smaller recovery. *Edney v. Baum* 294
4. Misconduct of a juror, not prejudicial to the party complaining, is not available error on review. *Vaughn v. Crites*, 812
 5. A judgment in a *mandamus* proceeding can only be reviewed on error. *State v. Affholder*..... 497
 6. Only such persons as are bound by a judgment are necessary parties to a proceeding in error. *Kuhl v. Pierce County*, 584
 7. Admission of testimony of a disqualified witness in a case tried to the court is not ground for reversal where there is sufficient competent evidence to support the judgment. *Lihs v. Lihs*..... 143
 8. A slight error in an instruction is not ground for reversal where the complaining party is not prejudiced. *Stein v. Vannice*..... 132
 9. Applicability of instructions to evidence and rulings as to testimony will not be considered in absence of a bill of exceptions. *Nelson v. Johnson*..... 7
 10. Error in the judgment of a justice of the peace cannot be shown by a bill of exceptions settled by him. *Vlasek v. Wilson*..... 10
 11. The character of the evidence introduced below can only be shown in the supreme court by a properly authenticated bill of exceptions. It cannot be shown by affidavits filed in the appellate court. *Scott v. Spencer*..... 93
 12. The ruling upon a motion for a new trial will not be reviewed where the evidence considered upon the hearing has not been preserved by a bill of exceptions. *Spotswood v. Nat. Bank of Commerce*..... 1
 13. An affidavit in support of a motion for a new trial, to be available on error, must be embodied in a bill of exceptions. *Chicago, R. I. & P. R. Co. v. Griffith*..... 691
 14. Where it appears from the bill of exceptions that important testimony has been omitted therefrom, an assignment that the verdict is not sustained by the evidence cannot be considered. *Omaha Fire Ins. Co. v. Berg*..... 522
 15. A motion for a new trial is a necessary part of a record to review by petition in error a judgment based on the findings of a court. *Weber v. Kirkendall*..... 766
 16. In reviewing a decision on a motion for a new trial, a stronger showing will be required to justify a reversal where the motion is sustained than where it is overruled. *Id.*

Review—continued.

17. The ruling of a trial judge in refusing to set aside a verdict on the ground that it is not sustained by the evidence will not be interfered with unless clearly wrong. *Central City Bank v. Rice*..... 595
18. A transcript of the proceedings below may be stricken from the files and the appeal dismissed where it appears that the certificate of authentication has been materially altered with the intention of misleading the appellate court. *Felber v. Boyd*..... 700
19. In sec. 586 of the Code, relating to transcripts for review, the word "proceedings" includes duly certified copies of the pleadings on which an action was tried. *School District v. Cooper*..... 714
20. Where a certified transcript of the proceedings is required for review, a case cannot be heard in the appellate court on the original pleadings, though the parties should so stipulate. *Id.*
21. A judgment supported by sufficient evidence will be affirmed where no question of law is involved on review.
Van Etten v. Edwards..... 57
Schelly v. Schwank..... 504
Will v. Elwood..... 847
22. Judgment on conflicting evidence will be affirmed unless clearly wrong. *Lihs v. Lihs*..... 143
Brown v. Cleveland..... 239
Younkin v. Younkin..... 729
Steinkraus v. Korth..... 777
23. A petition in error alleging misconduct of the jury must state the conduct complained of, and affidavits in support of the motion for a new trial on that ground must appear of record. *Houston v. City of Omaha*..... 63
24. "Irregularity in the proceedings of the court and jury, by which plaintiff was prevented from having a fair trial," is insufficient as an assignment of error in a reviewing court. *Id.*
25. An assignment in a petition in error, "errors of law occurring at the trial," presents nothing for review. *Id.*
26. Rulings on evidence cannot be reviewed in the supreme court under an assignment, "Error of law occurring at the trial, duly excepted to." *Schelly v. Schwank*..... 504
27. An assignment of error that the verdict is against the weight of evidence is not good. It should allege that the verdict is not sustained by sufficient evidence. *Barmby v. Wolfe*... 77

Review—concluded.

28. An assignment of error as to overruling a motion for a new trial must specify to which of several grounds it applies. *Stein v. Farnice*..... 132
29. Assignments of error as to giving or refusing a group of instructions are insufficient. *Schelly v. Schwank*..... 504
30. An assignment of error that the evidence of a witness was erroneously admitted will be overruled if any of his evidence is competent. *Eagle Fire Co. v. Globe Loan & Trust Co.*..... 381
31. Assignments that the verdict is not supported by sufficient evidence and that the judgment is contrary to law cannot be sustained on the ground certain evidence admitted without objection was irrelevant. *Ins. Co. of North America v. Backler*..... 550
32. Rulings on evidence will not be reviewed unless they are specifically assigned in the petition in error. *Edney v. Baum*..... 294
Smith v. Mason..... 611
33. Assignments by plaintiff in error not argued in his brief will be deemed waived. *Madsen v. State*..... 631

Road Funds. See HIGHWAYS.

Road Taxes. See MUNICIPAL CORPORATIONS, 2.

Sales. See ATTACHMENT, 4. EXECUTIONS. FACTORS AND BROKERS, 3. FRAUDULENT CONVEYANCES. JUDICIAL SALES. PRINCIPAL AND SURETY, 2-4.

1. Agreement, set out in opinion, held, not a conditional sale but a *del credere* agency. *National Cordage Co. v. Sims*.... 148
2. Sec. 26, ch. 32, Comp. Stats., requiring conditional sales of personalty to be in writing and filed with the county clerk, has no application where the relation of vendor and vendee does not exist. *Id.*
3. Where a vendee refuses to perform, the vendor may keep the property and sue for the difference between the contract price and the actual value of the property at the date of vendee's breach of contract, or the vendor may tender the property to vendee and sue for the contract price. *Lincoln Shoe Mfg. Co. v. Sheldon*..... 280
Lincoln Shoe Mfg. Co. v. Seifert..... 536

chools and School Districts.

A school-house site cannot be changed at a special election of the voters of a district, but may be relocated at any annual meeting by a vote of two-thirds of those present,

Schools and School Districts—concluded.

except where the original location is three-fourths of a mile from the center of the district, in which case the site may be, by a majority vote, located nearer the center.

Wilber v. Woolley..... 739

Seals. See TAX DEEDS, 1.

Set-Off

1. The insolvency of a party against whom a set-off is claimed is a sufficient ground for a court of chancery to allow it in cases not provided for by statute. *Richardson v. Doty*..... 73
2. In an action upon an attachment bond, a claim due the principal from plaintiff is a proper subject of set-off. *Field v. Maxwell*..... 900

Settlement. See COMPROMISE AND SETTLEMENT.

Sheriffs and Constables. See EXECUTIONS. JUSTICE OF THE PEACE, 2.

Slander. See LIBEL AND SLANDER.

Special Findings. See ATTACHMENT, 3.

Spiritualism. See WILLS, 2.

Statute of Frauds. See SALES, 2.

Statute of Limitations. See LIMITATION OF ACTIONS.

Statutes. See CONSTITUTIONAL LAW. TABLE, *ante*, p. lxi.

1. When two independent statutes are not necessarily in conflict, the latter will not be construed as creating an exception to the operation of the earlier. *Lingonner v. Ambler*..... 316
2. Sec. 49, ch. 14, Laws, 1889, does not repeal sec. 76 of the general road law. *State v. Cobb*..... 434
3. Where the legislature adopts the statute of another state, the judicial construction thereof in that state is also adopted. *Coffield v. State*..... 418
4. The statutes of another state are unavailing unless pleaded and proved. *Smith v. Mason*..... 611

Street Railways.

1. It is evidence of negligence on the part of the company to carry passengers greatly in excess of the seating capacity of the train, and to permit them to stand on the platforms and steps of the cars. *Pray v. Omaha Street R. Co.*..... 167
2. A passenger who is unable to secure a seat or standing room, and remains on the step of the car, is presumed to

Street Railways—concluded.

be there with the consent of the servants in charge of the train. *Id.*

3. Street railway companies are common carriers, and are presumptively liable for the concurrent negligence of their servants and third persons, resulting in personal injury to passengers. *Id.*
4. Standing on the front steps of a moving, crowded, street car is not such negligence as will prevent a passenger from recovering for injuries resulting from the negligence of persons in charge of the car. *Id.*
5. Evidence held insufficient to sustain a judgment for plaintiff in an action against a street railway company to recover for personal injuries resulting from defendant's negligence. *Omaha Street R. Co. v. Baker* 511

Students. See ELECTIONS, 1-3.

Subscription. See CORPORATIONS, 1, 3.

Summons.

Broatch v. Moore..... 640

Supersedeas. See BONDS.

Suretyship. See PRINCIPAL AND SURETY.

Surface Water.

A land owner may defend his premises against surface water by dike or embankment, but is liable for damages where he negligently and unnecessarily constructs an embankment and overflows the land of an adjoining proprietor. *Lincoln & B. H. R. Co. v. Sutherland*..... 526

Tacking. See MECHANICS' LIENS, 8.

Tax Deeds.

1. Valid tax deeds cannot be executed under the revenue law of 1879, because the legislature failed to provide for official seals for county treasurers. *McCauley v. Ohenstein*, 90
2. Payment of registration fee to county treasurer cannot be demanded as a condition precedent to execution and delivery of a tax deed. *Burnham v. State*..... 439

Taxation. See ATTORNEYS' FEES, 2. COUNTIES, 2. LIMITATION OF ACTIONS, 3. MUNICIPAL CORPORATIONS, 2. TAX DEEDS.

Rate of interest allowable to plaintiff on foreclosure of a valid tax sale certificate. *Osgood v. Grant*..... 350

Telegraph Companies.

1. Sec. 12, ch. 89a, Comp. Stats., prohibiting telegraph companies from limiting, by printed agreement on message-blanks, their liability for mistakes and non-delivery, is not inequitable, but binding upon the companies. *Western Union Telegraph Co. v. Kemp*..... 194
2. A printed statement on a message-blank that the company will not be liable for damages unless the claim is presented in writing within sixty days is not binding upon the sender of a message. *Id.*
3. A statement of a servant in an office as to the location of a certain town in answer to an inquiry is not within the apparent scope of his employment, and the company is not liable for the damages resulting from an error in such a statement. *Western Union Telegraph Co. v. Mullins*..... 732
4. Liability of a company for damages where it delivered the wrong message and the recipient took a useless journey in consequence of the mistake. *Id.*
5. A telegraph company is a public carrier of intelligence with rights and duties analogous to those of a public carrier of goods or passengers. *Western Union Telegraph Co. v. Call Publishing Co.*..... 326
6. Under like conditions a telegraph company must render its services to all patrons on equal terms. *Id.*
7. In order to constitute an unjust discrimination by a telegraph company there must be a difference in rates under similar conditions as to service. *Id.*
8. It is not undue preference to make to one patron a less rate than to another, where there exist differences in conditions affecting the expense or difficulty of performing the service. *Id.*
9. Where it is shown that a difference in rates exists, but that there is also a difference in conditions affecting the difficulty or expense of performing the service, no cause of action arises without evidence to show that the difference in rates is disproportionate to the difference in conditions. *Id.*

Telephonic Conversations. See EVIDENCE, 4.

Time. See APPEAL, 2.

Torts.

1. Where it is shown that subsequent to the alleged wrongful act a new and independent cause has intervened, sufficient to stand for the cause of the injury, the former

Torts—concluded.

is too remote to be made the basis of a recovery. *St. Joseph & G. I. R. Co. v. Hedge* 448

2. Where the evidence discloses a succession of intermediate events, each dependent upon the one immediately preceding it and all depending upon the original act, the latter is the primary cause of the resultant injury. *Id.*..... 449

3. Whether the natural connection of events is maintained or interrupted by a new and independent cause is usually a question of fact. *Id.*

Transcripts. See APPEAL, 2. JUDGMENTS, 5.

1. Where the appellant fails to bring up a copy of the proceedings below as they appear of record the transcript may be stricken from the files. *Felber v. Boyd*..... 700

2. Original pleadings cannot be used in an appellate court where the statute requires a certified copy. *School District v. Cooper*..... 714

Treasurers' Seals. See TAX DEEDS, 1.**Trespass.**

Where one buys a lot, erects a house thereon, and occupies it, the vendor is guilty of trespass in attempting to take possession forcibly during the former's absence, though the vendee made default under a contract of purchase authorizing vendor to take immediate possession in case of a failure to make a payment when due. *Ellsworth v. McDowell*..... 707

Trial. See DEPOSITIONS. EVIDENCE. INSTRUCTIONS. INSURANCE, 2. NEW TRIAL. PLEADING, 2, 9. REFERENCE. REVIEW, 7. WITNESSES, 3.

1. Prejudicial error does not result from introducing in evidence a petition verified by oath of plaintiff where he testified to the same statements during the trial and was cross-examined. *Burgess v. Burgess*..... 16

2. A party who takes the burden of proof during the trial, without objection from his adversary, should not be deprived of the right to open and close. *Id.*

3. The order of trial should be left largely to the discretion of the presiding judge. *Id.*..... 20

4. It is not reversible error to receive a general verdict without an answer to a special interrogatory where an answer in favor of the party complaining would not be inconsistent with the general verdict. *McClary v. Stull*..... 175

5. Recalling jury for instructions is so far within the discre-

Trial—concluded.

- tion of the trial court as not of itself to present a subject for review. *Id.*..... 176
6. Where a case is regularly called for trial and one of the attorneys for defendant orally announces that another attorney for defendant is unavoidably absent but will return soon in case of postponement, for a short time, and attend to the trial, it is not an abuse of discretion for the judge to insist that the case be dismissed, continued, or tried. *Corbett v. Nat. Bank of Commerce*..... 230
7. Under sec. 281a of the Code, an action in which the issues have been joined during the term may be placed upon the trial docket and tried at that term. *Osgood v. Grant*..... 350
8. Causes should be tried in the district court in their order upon the trial docket, unless otherwise ordered by the court in the exercise of sound discretion. *Id.*
9. Testimony admitted without objection will not be eliminated from the record because a timely objection to its admission would have been sustained. *Brown v. Cleveland*... 239
10. The ruling sustaining an objection to a question cannot be reviewed where there was made no tender of evidence which an answer, if permitted, would disclose. *Omaha Fire Ins. Co. v. Berg* 522
11. Error in admitting evidence given before objection has been made to its introduction cannot be shown in absence of a ruling on a motion to strike it out. *Kissinger v. Staley*.... 783
12. The taking of an exception is the act of parties or counsel in court. The notation of an exception on the record is merely evidence of the fact. *Blumer v. Bennett*..... 878
13. Where counsel excepts to an instruction when given and subsequently notes his exception on the margin, the court may properly ratify the notation by overruling a motion to strike it from the record. *Id.*

Trover and Conversion. See CONVERSION. LANDLORD AND TENANT, 6.

Trusts. See CORPORATIONS, 7. PARTNERSHIP, 5.

1. Where a trustee is invested with apparent title to property, persons dealing with him are not chargeable with undisclosed limitations upon his power with respect to the subject of the trust. *Stark v. Olsen*..... 648
2. Where a trustee's powers are clearly defined by a registered instrument creating the trust, persons dealing with him in respect to the trust property must at their peril take notice of the extent of his powers. *Id.*

Ultra Vires. See CORPORATIONS, 4.

University Students. See ELECTIONS, 1-3.

Usury.

1. To constitute a plea of usury there must be a statement of the contract, with whom it was made, its terms and character, and the amount of interest agreed to be reserved, taken, or received. *Bell v. Stowe* 210
2. In an action on a note it is error to admit, over plaintiff's objection, evidence of usurious transactions where the plea of usury is insufficient. *Id.*
3. Insufficiency of evidence to support judgment for defendant. *Id.*

Valued Policy Act. See INSURANCE, 23-25.

Vendor and Vendee. See FRAUDULENT CONVEYANCES, SALES.

1. A provision in a contract for the sale of land, authorizing the vendor to take immediate possession in case the vendee fails to make a payment when due, means no more than that a default shall confer a right of action upon vendor for possession of the premises. *Ellsworth v. McDowell* 708
2. Where the purchaser makes default in such a case the relation of vendor and vendee is not thereby changed to landlord and tenant. *Id.*

Villages.

1. The provision of sec. 40, ch. 14, Comp. Stats., for the incorporation of villages was not intended to clothe large rural districts with extended municipal powers, or subject them to special taxation for purposes to which they are in no wise adapted. *State v. Diamond* 154
2. Lands adjacent to a village may be incorporated therewith, provided they are in such close proximity thereto as to be suburban in character and have some unity of interest with the platted portion in the maintenance of municipal government. *Id.*
3. The statute for the incorporation of villages does not contemplate the incorporation of remote territory having no natural connection with the village and no adaptability to municipal purposes. *Id.*
4. The provision of sec. 101, ch. 14, Comp. Stats., for disconnecting territory from a city or village by petition is available only to legal voters of the territory sought to be detached. *Id.*

Voluntary Assignments.

A voluntary assignment is void unless made according to the provisions of the statute. *Kilpatrick-Koch Dry Goods Co. v. Bremers*..... 863

Voters. See ELECTIONS.

Waiver. See CRIMINAL LAW, 4-7. DAMAGES, 1. INSURANCE, 4, 8, 12-14, 19, 21. LANDLORD AND TENANT, 5.

Warrant of Attorney. See JUDGMENTS, 3.

Wills.

1. A probate court should not reject a will containing a valid bequest on the ground that the beneficiary under another bequest is incapable of taking or holding the property bequeathed. *McClary v. Stull* 175
2. A belief in spiritualism is not conclusive evidence of want of testamentary capacity where the testator is not affected with any delusion respecting matters of fact connected with the making of the will or the objects of his bounty. *Id.*
3. Where the testator's mind is not so controlled by his peculiar views as to prevent the exercise of a rational judgment touching the disposition of his property, the will should be sustained. *Id.*
4. Where it is claimed that the testator was controlled by insane notions with respect to a particular subject, the question to be determined is, whether he was the victim of such delusions as rendered him insensible to the ties of blood and kindred. *Id.*
5. Counsel fees in a will contest are not allowed as a matter of right, but are within the discretion of the court, and should be denied unless there appears to be a reasonable ground for the controversy. *Id.*..... 176
6. Attorneys who contract with contestant for twenty per cent of the fund in case of success should not be allowed fees out of the estate where they are defeated in the contest. *Id.*

Witnesses. See CRIMINAL LAW, 3. DEPOSITIONS. EVIDENCE, 7. INSTRUCTIONS, 2. LARCENY.

1. A wife cannot testify against her husband, over his objection, in an action to cancel a deed from him to his son. *Lihs v. Lihs*..... 143
2. A judgment will not be reversed on the ground that the trial court permitted leading questions, unless there was an abuse of discretion. *St. Joseph & G. I. R. Co. v. Hedge*, 450

Witnesses—concluded.

3. In showing the value of land taken for railroad purposes, error will not be presumed from the re-examination of a witness as to the price other land sold for, where the adverse party, on cross-examination, adopted that line of inquiry. *Chicago, R. I. & P. R. Co. v. Griffith*..... 690

Words and Phrases.

1. "Between." *Weir v. Thomas*..... 507
 2. "Dwelling house." *Corey v. Schuster*..... 269
 3. "Proceedings." *School District v. Cooper*..... 714
 4. "Scope of authority." *Fitzgerald v. Fitzgerald & Mallory Construction Co.*..... 463

Writs. See EXECUTIONS.

Written Instruments. See ALTERATION OF INSTRUMENTS.

Ex. J. M.

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